Christchurch shooter's video had to be uploaded before Facebook, YouTube, and Twitter could effectively block most of the footage before it was posted).

Instead of protecting good faith users of the platforms from capricious moderators, the transparency requirements in SB 7072 will sabotage security measures that most users greatly benefit from. Spandana Singh, *Everything in Moderation,* Chapter 3, New America: Open Technology Institute (July 22, 2019).[14] Digital hash technology has thus far been widely adopted by internet platforms to identify child sexual abuse material, copyright infringement, extremist content, and terror propaganda-related images, video, and audio online. *See* Masnick, *supra*. The requirement in SB 7072 to disclose "the standards, including detailed definitions" used for platform moderation is such broad language that it can encompass these unique hashes or other classifiers that trigger removal. Fla. Stat. § 501.2041(2)(a). Such disclosure would allow malicious actors to immediately determine if they will elude detection with a particular piece of content. Alexandra S. Levine, *From Camping To Cheese Pizza, 'Algospeak' Is Taking Over Social Media*, Forbes (Sept. 19, 2022) (explaining how social media users are increasingly using codewords and deliberate typos to avoid detection by natural language processing AI);[15] Singh, *Everything in Moderation* Chapter 4 (explaining how platforms have refrained from disclosing certain information about their automated moderation tools to prevent bad actors from gaming their systems).

Further, the requirement to disclose "a thorough explanation of the algorithms used" undermines platform security in the same way that exposing intelligence gathering "sources and methods" may undermine future intelligence gathering efforts. Fla. Stat. § 501.2041(2)(d). By

[14] Available at https://bit.ly/3xLDGAW.
[15] Available at https://bit.ly/3DNYFqO

learning how unwanted content is identified and actioned, sophisticated bad actors may circumvent detection and removal entirely.

Transparency requirements are not the only tool that SB 7072 gives to malicious posters. Providing that platforms must "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," "inform each user about any changes to its user rules . . . before implementing the changes" and, critically, refrain from making changes more than once every thirty days, SB 7072 effectively gives malicious actors a blueprint to circumvent platform security measures. *Id.* § 501.2041(h)(2)(a), (c). "Thanks to these publicly revealed policies, malicious actors now have more ability to figure out how to game the rules" that trigger removal. Masnick, *supra*. Because SB 7072 prohibits platforms from changing their rules—which includes modifications to content moderation algorithms—more than once every thirty days, platforms are faced with an absurd choice between improving the security they use to detect offensive content within a reasonable time frame or facing massive liability.

SB 7072's private right of action provides a hefty financial incentive for entrepreneurial Floridians to use the blueprint the law provides to find content moderation loopholes—up to $100,000 in statutory damages per post that a platform moderated "inconsistently." Fla. Stat. § 501.2041(2)(b), (6)(a). Even the best available content moderation tools are imperfect and inconsistent, not by human error or intentional design, but because of the inherent, unavoidable imperfections of the technology. *See, e.g.,* Copia Institute, *Content Moderation Case Study: Detecting Sarcasm Is Not Easy*, TechDirt (Sept. 10, 2020) (explaining the difficulty AI has in distinguishing between serious and jocular references to self-harm, thus creating

absurd and inconsistent results);[16] Deepa Seetharaman, Jeff Horwitz & Justin Scheck, *Facebook Says AI Will Clean Up the Platform. Its Own Engineers Have Doubts,* Wall St. J. (Oct. 17, 2021) (describing how still-crude Facebook AI mistook cockfights for car crashes and mistook videos live streamed by perpetrators of mass shootings as paintball games or trips through a carwash).[17] Transparency reports will only make it easier to get around moderation tools, and to manufacture hundreds of lawsuits for Florida courts.

The Eleventh Circuit upheld SB 7072's disclosure requirements after finding that they aren't "substantially likely to be unconstitutional" because they are not "unduly burdensome." *NetChoice,* 34 F.4th at 1209. But unlike the commercial disclosure requirements in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which were "purely factual and uncontroversial" and did not impose an undue burden on advertisers, disclosures of how platforms moderate are highly controversial—so controversial, in fact, that they have become one of the most hotly-contested issues in politics today. Complying with SB 7072 opens the platforms up to significant security risks and deprives them of their ability to provide a safe, enjoyable experience for their users and advertisers. If this is not an undue burden, it is hard to imagine what could be.

III. SB 7072 WILL FORCE PLATFORMS TO CARRY DISTURBING AND HARMFUL SPEECH

A platform where users cannot avoid disturbing content is likely not the free speech oasis Florida envisioned when it passed SB 7072. Pet. Br. 4, 6. Yet that is what will happen if platforms are required to host and display virtually all lawful speech made by "registered political candidates" and "journalistic enterprises," which are loosely

[16] Available at https://bit.ly/3yg4cm7.
[17] Available at https://bit.ly/3dAoxLQ.

defined to include, for example, popular online content creators who operate far outside the news media. Fla. Stat. §§ 106.072; 501.2041(2)(j). As one Republican state representative warned during floor debate on SB 7072, what "about potential candidates, about crazy people, Nazis and child molesters and pedophiles who realize they can say anything they want . . . if all they do is fill out those two pieces of paper?" David Rothschild, @DaveMicRot, Twitter, (May 24, 2021, 5:11 PM).[18] Indeed, the prospect of people registering as candidates just to be able to have carte blanche to share vile content online is not a wild hypothetical. Keith A. Spencer, *Why unmoderated online forums always degenerate into fascism*, Salon (Aug. 5, 2019) (explaining that selection bias and online psychology always lead unmoderated or lightly moderated "free speech" sites to become overrun with vile content);[19] Aristos Georgiou, *YouTube, TikTok Videos Showing Animals Tortured, Buried, Eaten Alive Viewed 5bn Times*, Newsweek (Aug. 25, 2021) (describing requests by animal rights groups for social media companies to develop more aggressive algorithmic moderation to prevent continuing dissemination of animal torture footage).[20]

To receive content moderation privilege under Florida election laws, candidates need only submit a notarized document indicating they have lived in Florida for two years, are a resident of the district where they are running, and are at least 21 years old. Florida Department of State Division of Elections, 2022 State Qualifying Handbook at 20.[21] Had SB 7072 been in effect over the last several years, social media networks would have been powerless to remove many instances of offensive or deceptive posts by political candidates. Cristiano Lima, *Twitter forces Democratic candidate to delete post flouting voter sup-*

[18] Available at https://bit.ly/3fcX2IR.
[19] Available at https://bit.ly/3NdgZuA.
[20] Available at https://bit.ly/3Cwiy4F.
[21] Available at https://bit.ly/3UvzXkP.

pression rules, Politico (Sept. 1, 2020) (explaining that Twitter forced Democratic House candidate to delete a tweet that misled Donald Trump supporters to vote the day after the actual election date);[22] Russell Brandom, *Twitter bans Florida Republican for encouraging the killing of federal agents*, The Verge (Aug. 19, 2022) (explaining that Twitter banned a Florida state House candidate after he advocated murdering federal agents);[23] Aiden Pink, *Even the Alt-Right is Sick of Paul Nehlen*, Forward (April 05, 2018) (explaining both Twitter and "free speech absolutist" platform Gab's decision to deplatform House candidate Paul Nehlen for violating community guidelines).[24]

Additionally, platforms must carry any and all content from any personality popular enough to meet SB 7072's definition of a "journalistic enterprise," including those far outside news media. Fla. Stat. § 501.2041(2)(j). The journalistic enterprise privilege would be extended to YouTubers such as PewDiePie, Mr. Beast, and podcast host Joe Rogan, each of whom "[p]ublishes 100 hours of audio or video available online with at least 100 million viewers annually." Alex J. Rouhandeh, *Joe Rogan Gets More Listeners in One Episode Than Neil Young, Joni Mitchell Get a Month*, Newsweek (Jan. 31, 2022). Further, extremist groups styling their work as journalism would also be able to post with impunity if they have enough readers. Rukmini Callimachi, *A News Agency With Scoops Directly From ISIS and a Veneer of Objectivity*, N.Y. Times (Jan. 14, 2016).[25]

SB 7072's must-carry provisions create two content-moderation-free zones for political candidates and "journalistic enterprises." Fla. Stat. § 501.204(d)(2), (2)(j). Case

[22] Available at https://politi.co/3StcVck.
[23] Available at https://bit.ly/3DLEuJM.
[24] Available at https://bit.ly/3Sucxdw.
[25] Available at https://nyti.ms/3C1dzIG.

studies from recent attempts to create "free speech" alternatives to Facebook and Twitter show that without robust content moderation tools in place, vile material reliably proliferates. For example, conservative social media sites Parler and GETTR initially promised to only moderate speech that violated United States law. Mike Masnick, *Parler Speedruns The Content Moderation Learning Curve; Goes From 'We Allow Everything' To 'We're The Good Censors' In Days*, Techdirt (July 1, 2020).[26] Both platforms were promptly overrun by obscene, violent, and racist content. *Id*. Trivial requirements for political candidates and low thresholds for journalistic enterprises ensure that platforms subject to SB 7072 will follow a similar trajectory.

Though some users like being able to post extremely offensive content, the vast majority will be put off by it, limiting the exercise of free speech on those platforms to a small minority. *See, e.g.*, Rachel DeSantis, *Parler, an App That's Becoming a Hit with Trump Supporters, Is Compared to an 'Echo Chamber'*, People (Nov. 17, 2020) (explaining that politically moderate users were dissuaded from using "free speech" social media platforms). The same happened with "free speech absolutist" website 8chan, which was eventually removed from the internet by its host for refusing to remove content that celebrated the 2019 El Paso shooting. Diana Rieger, et al., *Assessing the Extent and Types of Hate Speech in Fringe Communities*, Social Media + Society (Oct.–Dec. 2021) (explaining how 8chan, which practiced very little content moderation, became rife with right-wing extremist, misanthropic, and white-supremacist content). Under SB 7072, users would face a choice between ceasing the use of platforms like Facebook, Twitter, and TikTok or risking exposure to disturbing content.

[26] Available at https://bit.ly/3CtpJdD.

Implementing SB 7072 would require the platforms to host all the disturbing content that falls within the First Amendment's broad ambit of protection if that content is posted by "registered political candidates" or "journalistic enterprises." § 501.2041(d)(2), (2)(j). This includes posts depicting torture and mutilation of animals, which sites already receive thousands of per day. Casey Newton, *Bodies in Seats*, The Verge (Jun. 19, 2019).[27] It also includes terrorist recruitment material, racial slurs, and harassment.

SB 7072 aims to combat the purported "discriminatory dystopia" of social media companies' "censorship" of conservative voices. But prohibiting companies from shielding users from animal torture videos is likely not the free speech utopia many users want. Instead, SB 7072's loophole for privileged speakers may make dominant social media platforms functionally unusable for many Floridians.

IV. CERTIORARI IS NECESSARY TO HALT CONTINUING POLITICAL EFFORTS TO CONTROL ONLINE DISCOURSE

In a 2020 Senate Commerce Committee hearing, Senator Ted Cruz addressed Twitter's then-CEO Jack Dorsey, "Who the hell elected you and put you in charge of what the media are allowed to report and what the American people are allowed to hear?" Caitlin Oprysko, '*Who the hell elected you?': Cruz blasts Twitter CEO,* Politico (Oct. 28, 2020).[28] Implicit in this rhetorical question is the idea that elected officials *should* be in charge of media freedom and the information made available to the public. Unfortunately, the political right and left now share that instinct, and a sense of urgency to make the State the arbiter of editorial standards on social media. *See, e.g.*, *Twitter, Facebook*

[27] Available at https://bit.ly/2XWJBPC.
[28] Available at https://politi.co/3LBhpeK.

may need license to operate: US senator, The Economic Times (Sept. 14, 2022) (discussing "measure" in the works from one Democratic and two Republican senators to create a regulatory agency that would license social media platforms and potentially revoke their licenses for moderating in certain ways);[29] *Biden vows to end social media immunity over 'spreading hate'*, Al Jazeera (Sept. 16, 2022) (explaining that President Biden will ask Congress to "hold social media companies accountable" for hosting racist content);[30] Exec. Order No. 13925, 85 C.F.R. 34079 (President Trump's Executive Order intending to end Section 230 immunity for platforms after they, among other things, put a warning label on President Trump's tweets but not Rep. Adam Schiff's).[31] In the last year, over 100 bills have been introduced at the federal and state levels to expand state control over content moderation. Rebecca Kern, *Push to rein in social media sweeps the states*, Politico (July 1, 2022).[32] And in the wake of the Fifth Circuit's erroneous decision completely rejecting the longstanding First Amendment right to editorial freedom, political forces seeking to subvert the First Amendment may win. *See, e.g.,* Office of Governor Gavin Newsom, Governor Newsom Signs Nation-Leading Social Media Transparency Measure (Sept. 13, 2022) (new California law, AB 587, passed in effort to curb "hate and disinformation" online); Jake Zuckerman, *Committee passes bill to block social media from 'censoring' users*, Ohio Capital Journal (May 9, 2022) (describing Ohio's "anti-censorship" social media bill which bans "viewpoint discrimination").[33]

Without clarification from this Court that the First Amendment prohibits the entirety of SB 7072, political efforts to transfer editorial control to the state will contin-

[29] Available at https://reut.rs/3RfveB2.
[30] Available at https://bit.ly/3LzlUql.
[31] Available at https://bit.ly/3dxswsN.
[32] Available at https://politi.co/3DO2VXg.
[33] Available at https://bit.ly/3xIvjpK.

ue to proliferate. This will usher in a new era of dangerous regulation where government control of speech is no longer considered speech suppression, but instead speech "promotion"—unraveling decades of case law supporting editorial freedom. *Netchoice, L.L.C. v. Paxton*, 2022 U.S. App. LEXIS 26062, *93 (5th Cir. 2022) (holding that editorial discretion is not its own right but merely "one relevant consideration when deciding whether a challenged regulation impermissibly compels or restricts protected speech."). And this will create a domestic "splinternet," where information available to users—on platforms of all sizes and ideological leanings—are regionally divided on the basis of which content local politicians prefer.

This Court's precedent—and the text of the First Amendment—strongly supports a finding that social media platforms are private entities with First Amendment editorial rights. "The choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. 241; *see also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("[T]he choice of whether and how to exercise that editorial discretion is up to them, not up to the Government."). And "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 786 (U.S. June 27, 2011). Yet widespread confusion remains about whether government compulsion to publish or remove certain content is censorship.

SB 7072 and the growing number of efforts like it "fundamentally shifts the marketplace of ideas from its private, unregulated, and interactive context to one within the compass of state control, making the marketplace ultimately responsible to government for determinations as to the choice of content expressed." Emord, *Freedom,*

Technology and the First Amendment at 46. Giving the state this power, and the implied power to investigate and punish private companies whenever it thinks their editorial speech is "unfair" or "inconsistent," can and will be abused.

In *Reno v. ACLU*, 521 U.S. 844, 849 (1997), this Court emphasized that the First Amendment applies with full force to internet media. That case is the last time this Court directly addressed whether online services can be regulated as to the speech they choose to display and the manner in which they choose to display it. Certiorari is necessary again to preserve the First Amendment's role as a bulwark against government actors interfering with private media to advance political ends.

Applicant Details

First Name	**Marina**
Last Name	**Berardino**
Citizenship Status	**U. S. Citizen**
Email Address	**berar018@umn.edu**
Address	**Address** Street **9141 Olson Memorial Highway Apt. 304** City **Golden Valley** State/Territory **Minnesota** Zip **55427** Country **United States**
Contact Phone Number	**954-673-9740**

Applicant Education

BA/BS From	**Boston University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Minnesota Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Reitz, Kevin
reitz027@umn.edu
(612) 626-3078
Chang, Amy
amy.chang@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Marina Berardino
9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

June 12, 2023

The Honorable Judge Juan R. Sanchez
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

As a third-year student at the University of Minnesota Law School, I am writing to apply for a 2024 clerkship in your chambers. I became interested in clerking for a judge after observing criminal proceedings and meeting with federal judges in the District of Arizona during my externship with the United States Attorney's Office after my first year of law school. My strong legal research, writing and critical thinking skills will make me an effective clerk in your chambers.

I excelled throughout my first-year legal research and writing course and received class honors. As an extern with the criminal division at the USAO for the District of Arizona, I further developed these skills. Working with AUSAs I researched legal issues in active cases concerning violent crimes, financial crimes, national security threats, and crimes committed on the Southwest border. I wrote responses to motions, objections to pre-sentencing investigation reports, sentencing memoranda, and an appellate motion for summary affirmance. I further developed my legal research and writing skills during my judicial externship with Judge John Tunheim in the United States District Court for the District of Minnesota. Collaborating with the law clerks, I conducted legal research to prepare bench memoranda and draft orders. I continued to hone my legal research and writing skills through my clinical work with the Federal Defenders Office for the District of Minnesota where I completed motions concerning Fourth and Fifth Amendment violations and position pleadings for sentencing. This summer I hope to strengthen these skills through litigation assignments as a summer associate at Sullivan & Cromwell LLP.

As an executive board member of the competitive Mock Mediation team at Boston University, I learned the importance of zealous advocacy while appreciating the benefits of collaboration with opponents to achieve the best outcome. In both mediator and attorney roles, I competed in mediation simulations of complex legal issues. My critical thinking skills improved, as did my ability to collaborate in a fast-paced environment by developing and defending my arguments before a panel of judges in two-hour sessions.

I believe that my legal research and writing skills, along with my mock mediation experience, qualify me to be a useful clerk in your chambers. I have enclosed my resume, writing sample and law school transcript. Additionally, Amy Chang and Professor Kevin Reitz have prepared letters of recommendation to accompany my application. Thank you for your consideration.

Sincerely,

Marina Berardino

Marina Berardino

9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

EDUCATION

University of Minnesota Law School, Minneapolis, MN
J.D. Anticipated, May 2024
Minnesota Law Review, Staff Member (Vol. 107), Managing Editor (Vol. 108)
GPA: 3.917, Rank: 17 / 227 (calculated annually, current as of April 2023)
Awards: Dean's List – 2 Academic Years, Book Award – Advanced Administrative Law, Legal Research and Writing Section Honors
Activities: Minnesota Justice Foundation Street Law Volunteer, Asylum Law Project Volunteer

Boston University, Boston, MA
B.A., Political Science, *cum laude*, May 2021
GPA: 3.740
Honors: Panhellenic Honors Society
Activities: Alpha Phi Eta Chapter, Vice President of Membership Recruitment
Mock Mediation, Director of Public Relations: Social Media
InterNational Academy of Dispute Resolution (INADR) National Competitions:
2020 placed 2nd in Advocate/Client Category, 9th in Mediator Category;
2019 placed 3rd in Advocate/Client Category; 2018 placed 4th in Team Category

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY
Summer Associate, May 2023 – Present
Research legal issues regarding SEC and FCA regulatory enforcement actions and federal securities laws. Produce memoranda for litigation associates and partners. Attend client meetings and assist in preparation for testimony.

Federal Public Defender, District of Minnesota, Minneapolis, MN
Law Clerk, January 2023 – May 2023
Met with clients in preparation for writing motions and attending hearings. Shadowed attorneys and attended motion hearings, trials, and sentencings. Conducted legal research for and wrote motions filed in the District Court of Minnesota.

University of Minnesota Law School, Minneapolis, MN
Legal Research and Writing Student Instructor, September 2022 – May 2023
Coordinated weekly lesson plans with lead professor. Distributed materials to students. Provided nine students with detailed feedback on eight legal writing assignments. Met with students to further their research and writing development.

Honorable John Tunheim, U.S. District Court, District of Minnesota, Minneapolis, MN
Judicial Extern, September 2022 – December 2022
Wrote and edited bench memoranda and orders for Judge Tunheim. Researched various areas of federal law. Assisted law clerks with preparation for hearings.

United States Attorney's Office, District of Arizona- Criminal Division, Phoenix, AZ
Law Student Volunteer, May 2022 – July 2022
Researched legal issues in active cases, wrote briefs and motions filed in the District Court and Ninth Circuit Court of Appeals. Assisted with trial preparation and evidence review.

Boston University Political Science Department, Boston, MA (Remote)
Research Assistant, June 2020 – August 2020
Collected and analyzed data on housing policies enacted by states and cities in response to Covid-19. Coauthored with fellow researchers to produce 36-page policy report.

University of Minnesota Unofficial Transcript

Name : Berardino,Marina Rose
Student ID : 5461624
Birthdate : 7 - 17

Print Date: 05/30/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	A	16.000
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6005	Torts	4.00	4.00	A+	17.332
LAW	6006	Civil Procedure	4.00	4.00	A	16.000
LAW	6007	Constitutional Law	3.00	3.00	A-	11.001
TERM GPA :	4.022	TERM TOTALS :	17.00	17.00	15.00	60.333

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6004	Property	4.00	4.00	A	16.000
LAW	6009	Criminal Law	3.00	3.00	A-	11.001
LAW	6013	Law in Practice: 1L	3.00	3.00	P	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	A-	11.001
TERM GPA :	3.800	TERM TOTALS :	15.00	15.00	10.00	38.002

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6085	Criminal Procedure: Investigtn	3.00	3.00	A	12.000
LAW	6219	Evidence	3.00	3.00	B+	9.999
LAW	6614	Hist of the Amer Legal Profssn	2.00	2.00	A	8.000
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	H	0.000
LAW	7628	Judicial Field Placement	3.00	3.00	P	0.000
TERM GPA :	3.750	TERM TOTALS :	14.00	14.00	8.00	29.999

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6629	Indian Law	2.00	2.00	A	8.000
LAW	6650	Advanced Administrative Law	3.00	3.00	A+	12.999
LAW	6661	PR - General	3.00	3.00	A-	11.001
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	H	0.000
LAW	7572	CL: Federal Defense	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	14.00	14.00	11.00	44.000

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6036	Reproductive Rights & Justice	3.00	0.00		0.000
LAW	6039	US Supreme Court & Great Cases	3.00	0.00		0.000
LAW	6051	Business Associations/Corps	4.00	0.00		0.000
LAW	6126	Water Law	2.00	0.00		0.000
LAW	6604	Family Law	3.00	0.00		0.000
LAW	7100	Law Review Editors	2.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	17.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	3.917	UM TOTALS:	77.00	60.00	44.00	172.334
		UM + TRANSFER TOTALS:		60.00		

***** End of Transcript *****

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in strong support of Marina Berardino's clerkship application. On academic record alone, she will be competitive on the national clerkship market—and she adds considerable personal strengths to her intellectual firepower.

I first became acquainted with Marina as a student in my 1L Criminal Law course in Spring 2022. She is now enrolled in my upper level Criminal Procedure (Investigation) course. In addition, for the 2022-23 academic year, I am serving as faculty adviser for Marina's law review Note (for the flagship Minnesota Law Review). At Minnesota, this includes close contact with the student author at all stages of the research and writing process including topic selection, outline, first and second drafts, and an oral workshop presentation.

Marina has been one of most perceptive and engaged students in both of the courses she has taken with me. She has attended office hours regularly. I have been impressed with Marina's organized and energetic approach to her law school education and longer-term career plans. She is forward-looking and entrepreneurial while at the same time being personable, open-minded, and considerate. She is a serious, talented, professional, with a strong moral center and lack of pretense. She is impossible not to like.

Marina's abilities are evident from her law school transcript (she is currently 12th in her class with no grade lower than an A-) and in her successes on the job market (having won a 2022 summer volunteer position in the U.S. Attorney's Office for the Southern District of Arizona, a judicial externship in the U.S. District Court in Minneapolis, and a 2023 summer clerkship with Sullivan & Cromwell in New York City). Ultimately, her goals are to seek a federal clerkship, apply to the U.S. Department of Justice Honors Program, and pursue a career as a federal prosecutor.

Marina's plans have grown from knowledge gathering and mature reflection. As an undergraduate she was inspired by coursework in the criminal justice field, which initially set her on a path to become a criminal defense attorney. During her time in law school and the U.S. Attorney's Office in Arizona, however, she has developed the view that American legal systems are just as much in need of responsible prosecutors as strong defense advocates. One of Marina's friends and fellow students worked at a federal prosecutor's office before law school and recounted her experiences to Marina. For the first time, in her law school courses, Marina was exposed to the idea that prosecutors have a higher responsibility to do justice than to rack up the most convictions and the heaviest sentences. Last summer at the U.S. Attorney's Office in Arizona, Marina attended office-wide conferences in which current cases were discussed (and the opinions of law clerks were solicited). She was impressed with the balanced nature of the conversations and the restraint she saw among prosecutors in selecting cases and charges to be filed. She observed that there was a tendency to under-charge and to struggle conscientiously with the contours of a fair plea offer. She felt she was seeing the "do justice" ethic in actual practice. While she has told me she does not know if all prosecutors' offices have a similarly balanced culture, she became convinced that it was crucial for people with such sensibilities to become prosecutors.

Marina's history demonstrates a personal compassion that, for her, is a strong gravitational force. During her summer in Arizona, she became concerned with problems of domestic violence on Native American reservations and the shifting jurisdictional tangles that make those problems difficult to address. She was especially affected by her meetings with domestic violence victims and the hopelessness some of them voiced about their chances of getting help from the legal system. As a result of Marina's empathy for victims and her recognition of the complex jurisdictional and resource issues that frustrate effective response, she chose this as the subject of her law review Note. This helped me understand her character and her ambitions. She explained that she cares most about the people in the system—but is also attracted to the challenge of complex problems with no obvious solutions.

Marina recounted an anecdote that was revealing about her motivations to become a lawyer. In her current judicial externship, the clerks meet periodically to divide up assignments from the judge. Marina noted that she always volunteers to wade through pro se petitions, not always a popular task among the clerks. For Marina, however, it is deeply satisfying. She told me, "I feel sorry for the people. They have no lawyers to help them and some of them have legitimate claims." Marina's values and acute awareness of human consequences are exceptional—and much to be welcomed in the legal profession.

I am confident that Marina will shine in any interview she is offered. I hope that you will give her that opportunity. Please do not hesitate to be in touch if you would like more information. My cell number is 651-890-6897.

Best regards,

Kevin Reitz

Kevin Reitz - reitz027@umn.edu - (612) 626-3078

U.S. Department of Justice

Two Renaissance Square
40 N. Central Ave., Suite 1800
Phoenix, AZ 85004-4408

Main: (602) 514-7500
Main Fax: (602) 514-7693

June 10, 2023

Re: Marina Berardino's Judicial Clerkship Application

Dear Chambers:

I am happy to write a letter of recommendation on behalf of Marina Berardino, who is applying for a judicial clerkship in your chambers.

I had the opportunity to work with Marina during the summer after her 1L year, when she served as an extern for the United States Attorney's Office for the District of Arizona. In that role, Marina worked with criminal Assistant U.S. Attorneys at various stages of prosecution, including responding to motions to suppress, preparing jury instructions, revising search warrant affidavits, researching legal issues, drafting sentencing memoranda, and assisting with appellate briefs.

During her time in the office, Marina helped me with legal research regarding law enforcement's use of emergency disclosures to obtain information from electronic service providers. Her analysis was helpful in understanding the circumstances under which law enforcement can obtain and use these emergency disclosures in investigations. She also helped a colleague draft a motion for summary affirmance in response to a pro se defendant's Ninth Circuit appeal. Her draft was clear, organized, and well-written.

Marina was a wonderful and valued member of our summer class. Her work ethic, responsiveness, and open communication style demonstrated an eagerness to learn and to understand our cases. She met regularly with attorneys in the office to discuss cases, kept me and other AUSAs up to date on her progress, and sought out opportunities to develop her legal research and writing skills. She is a pleasure to work with and to be around and would be a terrific addition to your chambers. If you have any questions or would like to discuss further, please do not hesitate to contact me at Amy.Chang@usdoj.gov or (602) 514-7574.

Sincerely,

Amy C. Chang
Assistant United States Attorney

Marina Berardino
9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

Writing Sample

This writing sample contains objections to a presentence investigation report and a sentencing memo that I wrote during my summer 2022 externship with the United States Attorney's Office in the District of Arizona. It has only been edited by myself. I have received permission from the Assistant United States Attorney responsible for the case to use this piece as a writing sample. I edited the piece to preserve the anonymity of the defendant and victims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. XXX, Defendant.	**UNITED STATES' OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT and SENTENCING MEMORANDUM**

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is before the Court facing sentencing for Theft under 18 U.S.C. §§ 1153 and 661. On September 7, 2019, Defendant forcibly removed Victim 1 from his vehicle, repeatedly struck him in the face, grabbed him by the neck, and forced him to the ground. (Doc. 26 at 5). After taking the keys from Victim 1 and driving several miles away, Defendant attempted to remove Victim 2 from the vehicle but failed. *Id*. Victim 2 exited the vehicle on his own and Phoenix Police Department found Defendant with the stolen vehicle the next day. (Doc. 26 at 4). Then on September 9, Defendant was found at the scene of a single vehicle rollover accident involving a truck that he had stolen. (Doc. 26 at 7). Defendant has pleaded guilty to Count 2 of the indictment charging him with Theft. (Doc. 21 at 1).

II. OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

The United States, through undersigned counsel, respectfully objects to three aspects of the draft Presentence Investigation Report. (Doc. 26). First, the Court should

assess an enhancement under U.S.S.G. § 2B1.1(b)(16)(A) because the offense involved conscious or reckless risk of serious bodily injury. Accordingly, the offense level should be 14. After a two-level reduction for acceptance of responsibility, the total offense level should be 12. Based on Defendant's placement in Criminal History Category I, the Guideline range should be 10–16 months.

If the Court determines that § 2B1.1(b)(16)(A) does not apply, however, it should still assess a two-level enhancement under U.S.S.G. § 2B1.1(b)(3) because Defendant took the vehicle from both victims.

Finally, the Court should adjust the Guideline calculation for robbery contained in paragraph 69 of the PSR. The Total Offense Level should be 21 (rather than 19), resulting in a Guideline range of 37–46 months.

a. The § 2B1.1 offense level should be 14 because Defendant created a risk of serious bodily injury by punching Victim 1 in the face and leaving him in the streets alone.

Defendant pleaded guilty to Theft in violation of 18 U.S.C. §§ 1153 and 661. U.S.S.G. § 2B1.1 applies to this offense and the PSR writer assesses a baseline offense level of six with no enhancements. However, Section 2B1.1(b)(16)(A) states that "[i]f the offense involved … the conscious or reckless risk of death or serious bodily injury … increase by two levels. If the resulting offense level is less than level 14, increase to level 14." U.S.S.G. § 2B1.1(b)(16)(A). Serious bodily injury is any "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1 cmt. n.1(L). As the enhancement considers the

nature and extent of the offense to which Defendant pleaded guilty, the government must prove a § 2B1.1(b)(16)(A) enhancement by a preponderance of the evidence. *United States v. Johansson*, 249 F.3d 848, 852 (9th Cir. 2001).

The enhancement does not require significant bodily injury to have actually occurred because "it is the creation of risk, not the infliction of injury, that is required for application of [§2B1.1(b)(16)(A)]." *United States v. W. Coast Aluminum Heat Training Co.*, 265 F.3d 986, 993 (9th Cir. 2001). There need only be "some evidence" that the conduct created a risk of serious bodily injury. *United States v. Thorsted*, 439 F. Appx 580, 582 (9th Cir. 2011). In *United States v. Kantete*, the Court affirmed application of this enhancement to two vehicle thefts: the first was a carjacking and the second involved a police chase where another vehicle was hit. 610 F. Appx 173, 176 (3d Cir. 2015).

Other courts have applied the enhancement to conduct that is less directly linked to a risk of serious bodily harm than the conduct in this case. In *Thorsted*, the court held that a defendant making false distress calls to the United States Coast Guard created a risk of serious bodily injury by interfering with the "Coast Guard's ability to respond to actual distress calls" and because rescue missions are inherently risky. 439 F. Appx 580, 582 (9th Cir. 2011). *See also*, *Johansson*, 249 F.3d at 852 (9th Cir. 2001) (finding that the owner of a trucking business that authorized violations of federal regulations limiting the number of hours operators of motor carriers may drive created a substantial risk of bodily harm to other drivers on the road).

Another court, applying a similar guideline provision, concluded that a single punch by an unarmed person creates a substantial risk of significant bodily injury, a higher

standard than necessary here. *United States v. Alexander*, 712 F.3d 977, 979 (7th Cir. 2013). The *Alexander* Court further held that a risk of serious bodily harm can exist where a victim only suffers minor injuries not requiring medical attention. *Id*. at 978. *See also*, *United States v. Ashley*, 141 F.3d 63, 67 (2d Cir. 1998) (affirming district court's assessment that "there still is a substantial risk of serious bodily injury to someone who is on the receiving end of a punch or an elbow"); *United States v. Webster*, 500 F.3d 606, 607-08 (7th Cir. 2007) (finding that defendant's five punches and five kicks to victim's head caused serious bodily injury); *United States v. Reyes-Vencomo* No. CR 11-2563 JB, 2012 WL 2574810, at *8 (D.N.M. June 26, 2012) (reasoning that the defendant could have caused serious bodily injury to the victim by striking him in the face).

In the present case, defendant created a risk of serious bodily injury when he punched Victim 1 in the face, causing a swollen nose and bruising around the eyes, and when he attempted to pull Victim 2 out of the vehicle. (Doc. 26 at 5). Defendant's conduct posed a more direct risk of serious bodily harm than the conduct of the defendants in *Thorsted* and *Johansson*. Defendant admitted that he "forcibly stole a vehicle by physically assaulting the driver." (Doc. 26 at 16). He recalled striking Victim 1 in the face seven to eight times and grabbing him by the neck. (Doc. 26 at 5). He punched Victim 1 in the face "for approximately two minutes and left him lying on the ground of the parking lot." (Doc. 26 at 4). Defendant's assault of Victim 1 alone – which involved repeated blows to Victim 1's head – created a risk of serious bodily injury. This risk heightened when Defendant left Victim 1 in the parking lot.

This conduct evidences a less speculative risk of serious bodily harm than the actions of the defendants in *Thorsted* or *Johansson*. In *Thorsted*, the risk enhancement applied because Coast Guard personnel responding to the defendant's false distress calls flew at low altitudes at night. 439 F. Appx at 582. In the present case, Defendant posed a more immediate threat to the safety of others when he struck Victim 1 multiple times. *See Alexander*, 712 F.3d at 979. Defendant's conduct was also more dangerous than the conduct of the defendant in *Johansson*. The punches to Victim 1 and the attempted forcible removal of Victim 2 from the car involve identifiable victims, whereas the defendant in *Johansson* created a more general risk of harm to drivers on the road. The §2B1.1(b)(16)(A) enhancement is warranted considering Defendant's directly violent conduct and the injuries sustained by Victim 1.

If the court applies the enhancement from U.S.S.G. § 2B1.1(b)(16)(A), the total offense level would be 12 (rather than four) in Paragraph 23 of the PSR.

b. Even if U.S.S.G. § 2B1.1(b)(16) does not apply, Defendant should receive a two-level enhancement under U.S.S.G. § 2B1.1(b)(3) because the offense involved a theft from another person.

Should the court find U.S.S.G. § 2B1.1(b)(16) does not apply, it should increase the baseline offense level of six by two levels under U.S.S.G. § 2B1.1(b)(3) because the offense "involved a theft from a person of another." Defendant admitted in his plea agreement that he took the motor vehicle from Victims 1 and 2 (Doc. 21 at 7). After striking Victim 1 several times in the face, Defendant took the keys and drove off with Victim 2 still in the vehicle. (Doc. 26 at 5). Victim 2 exited the vehicle after Defendant attempted to forcibly remove him. *Id*. Defendant then drove off with the vehicle alone. *Id*.

The PSR writer did not apply the enhancement because the commentary to U.S.S.G. § 2B1.1 defines "theft from the person of another" as "theft, without the use of force, of property that was being held by another person or was within arms' reach." U.S.S.G. § 2B1.1 cmt. 1. The comment limits the enhancement to non-forcible conduct because the robbery guideline would generally apply to forcible threats. U.S.S.G. § 2B1.1 cmt. (background).

Although the comment concerns non-forcible actions, it is illogical to limit the application of the enhancement to the non-forcible examples in the commentary (pick-pocketing and non-forcible purse-snatching) when the defendant committed a more serious taking and the § 2B1.1 guideline rather than the robbery guideline applies. The Court should apply the enhancement as it would in a case not involving a forcible taking.

If the Court finds that the comment does not permit this enhancement, the Court should nonetheless depart upward to account for the forcible taking of the vehicle from Victims 1 and 2.

c. Had Defendant been convicted of robbery, the total offense level would be 21.

The Probation Officer concludes that had Defendant been convicted of robbery, the counts would have been grouped pursuant to U.S.S.G. § 3D1.2(d) and the controlling guideline would impose a Total Offense Level of 19 and a Guideline range of 30–37 months. The United States disagrees with this calculation.

The base offense level for robbery is 20 pursuant to U.S.S.G. § 2B3.1. There are two applicable specific offense enhancements that increase the § 2B3.1 calculation to

offense level 24. First, "[i]f any victim sustained bodily injury," the offense level increases by two. Bodily injury is "any significant injury; *e.g.*, any injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1 cmt. n.1(B). In this case, Victim 1 sustained bodily injuries from Defendant as documented in his arrest records. While Victim 1 blacked out and was unable to recall what happened at the bank with Defendant, he did wake up in jail with a swollen nose and bruising around his eyes. (Doc. 26 at 5). This is an injury that is both painful and obvious. *See United States v. Goss* 241 Fed. Appx. 440, 442 (9th Cir. 2007) (agreeing with the District Court that the victim sustained bodily injury as evidenced by two black eyes, facial bruising, and broken ribs).

A second two-level enhancement under U.S.S.G. § 2B3.1(b)(5) would apply because the offense involved carjacking. Section § 2B3.1 defines carjacking as "the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation." U.S.S.G. § 2B3.1 cmt. n.1. Here, after Defendant struck Victim 1 in the face, grabbed him by the neck, and threw him to the ground, he took the keys out of Victim 1's pocket, entered the vehicle, and drove off. (Doc. 26 at 5). He also attempted to pull Victim 2 out of the vehicle while Victim 2 was passed out in the front seat. *Id*.

After a three-level reduction for acceptance of responsibility, the total offense level under the Guidelines for a plea to robbery would be 21 (rather than 19) in Paragraph 69 of the PSR, and the resulting hypothetical Guideline imprisonment range would be 37–46 months.

III. A 16-MONTH SENTENCE IS APPROPRIATE UNDER 18 U.S.C. § 3553(a).

The United States recommends the Court impose a sentence of 16 months imprisonment in consideration of the 18 U.S.C. § 3553(a) factors. If the Court overrules the United States' objection and adopts the range calculated in the PSR, the Court should vary or depart upward.[1] The PSR writer also suggests an upward departure may be appropriate to account for dismissed and uncharged conduct.[2]

The nature and circumstances of the offense are notably serious. Defendant caused physical injury to Victim 1 which is beyond what is contemplated in a sentence for a non-forcible theft under U.S.S.G. § 2B1.1. Defendant's history and characteristics show that this offense was not an isolated incident. Shortly after the incidents of the present offense, Defendant stole a truck in Peoria, Arizona and intentionally caused a single vehicle rollover accident. (Doc. 26 at 7). Defendant also has a pending charge for receiving or transferring a stolen motor vehicle in November 2019. (Doc. 26 at 8). Defendant's conduct in the

[1] The commentary to § 2B1.1 states that an upward departure is warranted when "[t]he offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm…." U.S.S.G. § 2B1.1 cmt. n.21(A)(ii). Thus, even if the Court does not apply the U.S.S.G. § 2B1.1(b)(3) 2-level enhancement for theft from a person of another or the § 2B1.1(b)(16)(A) enhancement to level 14 for creating a risk of serious bodily injury, the Court should depart upwards to level 12 to account for the non-monetary harm caused by Defendant.

[2] U.S.S.G. §5K2.21 advises a departure may be appropriate to reflect "the actual seriousness of the offense based on conduct … underlying a charge dismissed as part of a plea agreement" that did not factor into the Guideline range. If Defendant had been convicted of robbery as charged, his Guidelines range would have been 37–46 months imprisonment.

present offense was part of a series of offenses during which he stole multiple vehicles. Thus, a sentence of 16 months is appropriate to deter Defendant from further engaging in such conduct. All these factors suggest that the United States' recommended sentence will be sufficient to account for the dismissed conduct, nature and circumstances of the offense, history and characteristics of Defendant and the need for adequate deterrence.

IV. CONCLUSION

For the foregoing reasons, the United States recommends that Defendant be sentenced to 16 months' imprisonment.

Applicant Details

First Name	**Dany**
Last Name	**Berbari**
Citizenship Status	**U. S. Citizen**
Email Address	**hhv8af@virginia.edu**
Address	**Address** Street **3102 Yellow Rose Ln SW** City **Rochester** State/Territory **Minnesota** Zip **55902**
Contact Phone Number	**507-319-8792**

Applicant Education

BA/BS From	**University of Minnesota-Twin Cities**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 6, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Sports and Entertainment Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Forde-Mazrui, Kim
kfm@law.virginia.edu
(434) 924-3299
Bowers, Josh
jbowers@law.virginia.edu
434-924-3771
Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dany E. Berbari

2101 Arlington Blvd. Apt.234, Charlottesville, VA 22903
(507) 319-8792• hhv8af@virginia.edu

The Honorable Juan Sanchez
U.S. District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, Pennsylvania

Dear Chief Judge Sanchez:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to you to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

Below, please find a copy of my resume and both my law school and undergraduate transcripts. I have also included as a writing sample an abridged version of a paper I wrote for my Disability Law course, titled, "Weighing the Scales of Justice: Why Severe Obesity, in and of itself, should be Considered an Impairment Under the Americans with Disabilities Act." Finally, you will be receiving letters of recommendation from Professor Kim Forde-Mazrui (434-825-1970 or 434-924-3299), Professor Josh Bowers (434-924-3771), and Professor Charles Barzun (434-924-6454), who have each stated that they would be happy to speak with you directly.

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you very much for your time and consideration.

Sincerely,

Dany Berbari

Dany E. Berbari

2101 Arlington Blvd. Apt.234, Charlottesville, VA 22903
(507) 319-8792• hhv8af@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- GPA: 3.647
- *The Virginia Sports and Entertainment Law Journal*, Editorial Board
- Student Note, *Journal of Law and Politics* (forthcoming)
- Community Fellow and Peer Advisor

University of Minnesota, Minneapolis, MN
BA, Political Science (Minor: Sociology of Law, Arabic), *summa cum laude*, May 2021

- GPA: 4.00
- Undergraduate Teaching Assistant of the Year
- Admissions Ambassador

EXPERIENCE

Maslon LLP, Minneapolis, MN
Summer Associate, May 2022 – August 2022; May 2023 – August 2023

- Researched and drafted memoranda, motions, and petitions on property disputes, labor and employment issues, and various procedural questions
- Assisted attorneys in preparing for depositions

University of Minnesota, Minneapolis, MN
Teaching Assistant, January 2019 – May 2021

- Tutored and responded to questions from students (class size of 80-140)
- Graded as many as 100 papers and quizzes a week and assisted the professor with creating course pages and syllabi, maintaining the grade books, and saving class records

Distinguished Undergraduate Research Program, January 2019 – June 2019

- Assisted professor Anoop Sarbahi in research tasks, including compiling and organizing thousands of documents on resources, languages, and conflicts in Southeast Asia

WATCH Project, Minneapolis, MN
Intern, January 2018 – June 2018

- Monitored trials, arraignments, and bail hearings daily and analyzed court records for trend data on sexual assault and domestic violence for use in reports

Victoria's Ristorante, Rochester, MN
Waiter and Catering Assistant, October 2015 – March 2020

- Assisted in organizing and running large catering events and weddings

PERSONAL

Interests: Cooking, running, sports, aviation, piano

Language Proficiency: Arabic (fluent)

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Dany Berbari

Date: June 07, 2023
Record ID: hhv8af

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	A-	Woolhandler,Nettie A
LAW	6002	Contracts	4	B+	Johnston,Jason S
LAW	6003	Criminal Law	3	A-	Frampton,Thomas Ward
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	A-	Solum,Lawrence
LAW	7038	Disability Law	3	A-	Forde-Mazrui,Kim A
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	7074	Professional Sports & Law	2	A	Levinstein,Mark S
LAW	6006	Property	4	A-	Johnson,Alex M
		FALL 2022			
LAW	6104	Evidence	4	A	Barzun,Charles Lowell
LAW	6105	Federal Courts	4	A-	Bayefsky,Rachel
LAW	7179	Race and Criminal Justice	3	A-	Bowers,Josh
LAW	8018	Trusts and Estates	3	A	Cahn,Naomi Renee
		SPRING 2023			
LAW	6102	Administrative Law	4	A-	Bamzai,Aditya
LAW	7089	Racial Justice and Law	3	A-	Forde-Mazrui,Kim A
LAW	7078	Remedies	3	B+	Laycock,H Douglas
LAW	9081	Trial Advocacy	3	A-	Benes,Bethany Ruth

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am very pleased to recommend Dany Berbari for a judicial clerkship. I am the Mortimer M. Caplin Professor of Law and the Director of the Center for the Study of Race and Law at the University of Virginia. I teach and write principally in the areas of Constitutional Law, Racial Justice, Employment Discrimination and Disability Law. I am honored to have served as a judicial clerk to the Honorable Cornelia G. Kennedy of the United States Court of Appeals for the Sixth Circuit (1993-'94).

Dany has completed two of my courses, Disability Law and Race and Criminal Justice, and is currently enrolled in my Racial Justice and Law course. All three classes were small (six, ten and thirteen students, respectively) and discussion-based so I was able to observe and interact with Dany frequently. He was consistently well prepared and engaged, adding well-informed and astute observations to the discussion. He wrote strong papers in the prior courses, receiving an A- on both. I would note that the law school imposes a strict B+ mean on all courses, which makes awarding A grades in small courses challenging because of the need to offset them with B's or B-'s. I was pleased to learn that his Race and Criminal Justice paper, "Drug Decriminalization and Gun Criminalization: Assessing the Compatibility of these Asymmetrical Beliefs from a Racial Justice Lens," has been accepted for publication in the Journal of Law & Politics. I would also note that his academic record has steadily strengthened every semester. While his overall GPA is 3.66, his GPA last term was 3.85.

Dany has also been actively engaged in the law school community. He is an associate editor of the Sports and Entertainment Law Journal, a member of the Middle Eastern and North African Law Association, a Community Fellow, and a Peer Advisor. His passion for peer mentoring is rooted in his experience as a teaching assistant (TA) at the University of Minnesota, where he received the best TA award.

I commend Dany's character and personality in the strongest terms. He is exceptionally diligent and hard working. In addition to class preparation, he began working on his papers early, discussing ideas with me and developing full drafts well before other students. This term, he is the only student out of thirteen to meet with me to discuss his idea for his paper. He is also highly respectful and gracious, making sure that I truly had time to meet with him or to review a draft of his paper, and thanking me quite genuinely. He is curious, open-minded and takes feedback well. He is also easy going, unfailingly cheerful and endearing. I am always delighted when he comes to my office hours.

I am certain that you would be very well served by Dany Berbari as your judicial clerk and that you would appreciate working with him. Please feel free to contact me if you would like to discuss his qualifications further. My mobile number (call/text) is 434-825-1970 and my e-mail address is kfm@law.virginia.edu.

Very truly yours,

Kim Forde-Mazrui
Mortimer M. Caplin Professor of Law
Director, Center for the Study of Race and Law
580 Massie Road, Charlottesville, VA 22903-1738
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June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to highly recommend Dany Berbari for a clerkship in your chambers. I am a Professor of Law at the University of Virginia School of Law. Additionally, I have clerked for the Honorable Dennis Jacobs of the Second Circuit Court of Appeals.

During the 2022 fall semester, Dany enrolled in my seminar, "Race & Criminal Justice." The upper-level course tackled pressing moral, prudential, and jurisprudential questions (about, for instance, racial disparities in enforcement, prosecution, and punishment). Many students become somewhat paralyzed when presented with tough normative and policy questions for which there are no obvious black-letter doctrinal answers. But Dany engaged ably with the difficult class materials and offered constructive in-class comments and responses to the readings. I was impressed right from the start. He possesses a quiet composure and always offers insights that move class discussions in fruitful directions.

Most importantly for present purposes, Dany is exceptionally hard working, diligent, and well prepared. I recall that he was the first student to submit every assignment. And he consistently did solid work on those assignments, including his final seminar paper which was one of the best in the class—an insightful and provocative comparison of the racialized nature of our criminal-legal wars against drugs and guns. Dany concluded that the distributive justice arguments for criminalizing guns are much stronger than the arguments for criminalizing drugs but that reasons remain for questioning, constitutionally and otherwise, aspects of prevailing gun law and policy (at least in application). The paper was not only substantively strong but also extremely well written. His prose was powerful, persuasive, and quite clear. Dany has an innate understanding for the proper tone and structure necessary to support and coherently present a set of legal arguments and conclusions—skills that will serve him well as a law clerk. Dany and I have since discussed his plans to expand upon his final project, and I have encouraged him to develop it into a published student Note.

You may notice that Dany received only an A- for my seminar—a stellar grade but one that does not quite reflect the quality of Dany's phenomenal coursework. Unfortunately, I was hamstrung by a strong class and a strict curve, which left me with the opportunity to award too-few solid A's¬. If I could have given even one more, it would have gone to Dany. He well deserved the mark. I was pleased, then, to discover that Dany has earned and received A-level

grades in all his recent courses. Indeed, without disparaging any of my colleagues, I should note that Dany's only B-level grades (during 1L year) came from professors I know to be somewhat erratic graders. In any event, there is an obvious upward trajectory to Dany's grades. It is a trajectory that I often see in some of our deepest-thinking students: early on (and especially in exam-based classes), they may struggle just a bit reducing complex problems to concrete answers, but once they find their footing (particularly, when they start to take paper-based courses) they shine.

Dany is more than just an exceptional student and writer. His demeanor may be somewhat reserved, but he is admirably active and engaged. He is on the Managing Board of The Virginia Sports and Entertainment Law Journal, Editorial Board. And he participates in the Middle Eastern and North African Law Association. Finally, he serves the law school as a Community Fellow and Peer Advisor.

Overall, Dany is just a gem of a person—extremely decent and mature and unfailingly polite. He is the kind of student that makes teaching easy, and I know that he has what it takes to make a great clerk. He possesses the work ethic and intellect to succeed, and the amiable and humble disposition to make a good addition to any chambers. I hope you will give him that opportunity. If you have any further questions or need additional information, please do not hesitate to contact me.

Thank you,

/s/

Josh Bowers
Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903
Phone: 434-924-3771
Fax: 434-982-2845
Email: bowers@law.virginia.edu

May 30, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend highly Dany Berbari for a clerkship in your chambers. Dany is an extremely bright young man, who I think would make a terrific clerk in any chambers.

I got to know Dany the fall of his second year when he enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Dany's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That meant that I got to know the students better than I normally do. It is not an exaggeration to say that Dany impressed me more than any other single student all semester long. Not only did he always know exactly what I was getting at when I called on him; he also asked questions that demonstrated a level of mastery of, and insight into, the material that seemed unmatched by any of his classmates. I was thus not surprised that his was among the best exams in the class, earning an A for the course.

Dany's performance in Evidence has been typical of his law-school performance overall. After three semesters, he has a GPA of 3.66, which places him very close to the top 15% of his law-school class. After receiving an anomalous B and a B+ in his first semester, Dany has received straight As and A-'s in his last two semesters. Even more impressive, he has put together that record while throwing himself into the intellectual and extracurricular life of the law school. Dany serves on the Virginia Sports and Entertainment Law Journal, the Middle Eastern and North African Law Association, and works as a Community Fellow and Peer Advisor.

Dany grew up in Minnesota and plans to return to Minneapolis after graduation. I have little doubt that he will have a successful legal career there because he is smart, thoughtful, and serious. The son of Lebanese immigrants, Dany is fluent in Arabic and has lived in Lebanon. Although he came to law school straight from college, he has faced his share of adversity and, perhaps for that reason, quietly conveys a sense of maturity beyond his years.

For those reasons, I think Dany will make a fantastic judicial clerk. Still, if you have any questions about him, or would like to discuss his candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

Weighing the Scales of Justice: Why Severe Obesity, in and of itself, should be Considered an Impairment Under the Americans with Disabilities Act

I. Introduction

"The Borgata Hotel Casino & Spa in Atlantic City obsessively monitored the weight of its waitresses, according to 22 of them who sued it in 2008. They would be suspended, for example, if they gained 7 percent more weight than they had when they were hired." [1] "A hospital in Victoria, Texas., made headlines in 2012 after it imposed a strict body mass index (BMI) limit on employees — 35, in the obese range, was the cutoff — citing patients' expectations of what a health-care provider should look like."[2] While these actions are harmful and discriminatory, they are nonetheless entirely legal.[3] Obese individuals face an immense amount of discrimination in the workplace, with nearly ninety three percent of employers preferring to hire and work with persons who are of "normal weight." [4] The Americans with Disabilities Act (ADA) was passed to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, "[5] and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[6] Despite this charge, nearly every circuit court[7] has held that severe obesity[8] must be caused by an underlying physiological condition to be considered an impairment and thus potentially protected by the ADA.[9] This note will argue that based on the definition of impairment, Equal Employment Opportunity Commission guidance (EEOC), and the purpose of the ADA and the Americans with Disabilities Amendments Act

[1] Rebecca Puhl, *Weight Discrimination is Rampant. Yet in Most Places it's Still Legal,* The Washington Post (June 21, 2019), *https://www.washingtonpost.com/outlook/weight-discrimination-is-rampant-yet-in-most-places-its-still-legal/2019/06/21/f958613e-9394-11e9-b72d-d56510fa753e_story.html*.
[2] *Id.*
[3] *Id.*
[4] Overweight and Underpaid: Weight Discrimination at Work, EKU Online (July 21, 2020), https://safetymanagement.eku.edu/blog/overweight-and-underpaid-weight-discrimination-at-work/.
[5] 42 U.S.C. § 12101(b)(1).
[6] 42 U.S.C. § 12101(b)(2).
[7] The Fifth and Ninth Circuit have yet to provide a clear answer. The First Circuit has only ruled regarding the Rehabilitation Act. More information will be provided in the next section.
[8] Severe obesity and Morbid obesity are used interchangeably. There will be further discussion on the definitions and distinctions between obese and severely obese, along with why I am limiting my discussion to severe obesity.
[9] 42 U.S.C. § 12102 (1). Further discussion on the ADA and its elements is provided below.

(ADAA) of 2008, severe obesity should be considered an impairment regardless of whether it is caused by an underlying physiological condition.

This note will begin with a framework for the paper and discuss the relevant provisions of the ADA, the EEOC's definition of impaired, and the distinction between obese and severely obese. Next, relevant United States Court of Appeals decisions and their reasonings as to why severe obesity in and of itself is not an impairment will be discussed. Following this section, arguments as to why the courts' restrictive interpretations are unjustified will be presented. The note will then conclude by acknowledging the consequences (both positive and negative) that would ensue from classifying severe obesity as an impairment (this section is omitted).

II. Framework, Scope, and Definitions

A. Elements of ADA that will be focused on

First, it is necessary to lay out important components of the ADA and more precisely, outline which of those elements the analysis on obesity will be limited to. To be protected by the ADA, an individual must be considered a person with a disability.[10] The definition of a disability is "perhaps the most important and litigated element of the ADA." [11] The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) having a record of such an impairment; or (C) being regarded as having such an impairment." [12] While prongs B and C are important, this note will focus specifically on prong A, otherwise known as "the actual disability prong.[13] More precisely, the analysis will place emphasis on the first component of an actual disability- that is, whether severe obesity is and should be considered a physical or mental impairment. This point is of great importance as individuals with severe obesity would not be protected from discrimination by their employer or in places of public accommodations if their condition is not

[10] 42 U.S.C § 12182.
[11] Stephen F. Befort and Nicole Buonocore Porter, *Disability Law Cases and Materials* 19 (2nd Ed. 2021).
[12] 42 U.S.C. § 12102 (1).
[13] Befort and Porter, *supra* note 11, at 23.

judged as an impairment. Those individuals would also be denied the right to bring claims under the "regarded as" or "record of" prongs of the ADA.

It is also important to briefly explain the definition of a physical or mental impairment. The EEOC defines disability as:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs; cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.
>
> Or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities [14]

The Code of Federal Regulations further provides a non-exhaustive list of diseases and conditions that could be considered impairments, such as "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and… drug addiction and alcoholism."[15]

B. Definitions of Obesity

Generally speaking, there are five weight categories that are based on Body Mass Index.[16] These include "underweight" (BMI of under 18.5), "healthy weight" (BMI of 18.5-24.9), "overweight (BMI of 25.0-29.9), "obese" (BMI of 30- 39.9) and "severely obese" (BMI of above 40 or "100 pounds over their healthy body weight").[17] Over 40 percent of individuals in the United States who are older than 20 years in age are considered obese, with around 30 percent falling in the "overweight category." [18] 9 percent of

[14] 45 C.F.R § 84.3 (j)(2)(i) (1997).
[15] 45 CFR pt. 84, App. A, p. 334 (1997).
[16] See *Understanding Your Weight and Health: What is Obesity,* OAC (May 22, 2020). https://www.obesityaction.org/get-educated/understanding-your-weight-and-health/what-is-obesity/ (also defining Body Mass Index (BMI) as a persons "weight related to their height").
[17] *Id.*
[18] *National Center for Health Statistics: Obesity and Overweigh,* Centers for Disease Control and Prevention (Sept. 10, 2021), https://www.cdc.gov/nchs/fastats/obesity-overweight.htm.

adults in America are "severely obese." [19] As nearly all case laws focus on severe obesity and since over 180 million people are in the overweight or obese category, the totality of the arguments, alongside the possibility that the court would likely be unwilling to interpret the ADA in a way that reaches hundreds of millions of people, support limiting this discussion to only severe obesity. [20]

III. The Circuit Court's Rationale as to why Obesity not Caused by an Underlying Physiological Condition Cannot be Considered an Impairment

This paper will first examine where courts currently stand and their reasoning as to why severe obesity cannot be considered an impairment. Because the Supreme Court has yet to hear a case on the ADA and severe obesity, this section will focus on circuit court cases. Before beginning the analysis, it must be acknowledged that three circuits have not ruled on whether severe obesity is an impairment under the ADA. The Fifth and Ninth Circuits have creatively avoided the issue,[21] while the First Circuit has only issued an opinion on obesity under the Rehabilitation Act.[22]

A. EEOC Guidance Explains that Severe Obesity Must be Caused by an Underlying Physiological Impairment to be Considered an Impairment

[19] *Overweight & Obesity Statistics,* National Institute of Diabetes and Digestive and Kidney Diseases (Sept. 2021), https://www.niddk.nih.gov/health-information/health-statistics/overweight obesity#:~:text=%25)%20are%20overweight,More%20than%202%20in%205%20adults%20(42.4%25)%20have%20obesity,9.2%25)%20have%20severe%20obesity.

[20] Even after the ADA Amendments Act of 2008, persons "with ordinary glasses or contact lenses" are almost never considered disabled as the mitigating effect of glasses can be considered. 42 U.S.C. § 12102 (4)(E)(ii). This is likely because Congress did not want the ADA to be expanded to the around 160-190 million people that wear eyeglasses/contacts. *Organizational Review,* The Vision Council (2018). The same reasoning can apply to why the legislative and judicial branch would never extend the ADA to overweight/obese persons.

[21] When confronted with an ADA, severe obesity case, the Fifth and Ninth Circuits have avoided the question of whether severe obesity is an impairment, opting to instead say that even if it is an impairment another element of the case is missing, so they need not make a definitive ruling regarding impairment. *See* Tucker v. Unitech Training Acad. Inc., 783 F. App'x 397 (5th Cir. 2019); Valtierra v. Medtronic Inc., 934 F.3d 1089 (9th Cir. 2019).

[22] Cook v. State of R.I., Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993). The court expressed a sympathetic view and held that under the Rehabilitation Act, morbid obesity can be considered an impairment. *Id*. The state argued that severe obesity was not an impairment because it was mutable and voluntary. Having only argued on those two grounds, with the court finding both to be irrelevant in a determination of what is an impairment, the state lost. *Id*. For these reasons, other district courts argue that this should not be relied on. See Richardson v. Chicago Transit Authority, 926 F.3d 881, 890 (7th. Cir. 2019); Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997). Although the Rehabilitation Act applies in a more limited set of circumstances than the ADA, the court's reasoning is nonetheless persuasive and informs part of the argument to come.

The most common argument circuit courts put forth is that the EEOC's interpretive guidance clearly indicates that severe obesity by itself cannot be considered an impairment. Because the definition of impairment (listed above) is open ended and somewhat vague, the EEOC released regulatory guidance clarifying the list. One guideline explains, "The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder." [23] Courts interpret this statement to mean that one's weight is considered an impairment "only if it falls outside the normal range *and* it occurs as the result of a physiological disorder" as opposed to "for a weight in the normal range to be considered an impairment it must be caused by an underlying physiological disorder." [24] It is argued that the latter interpretation would lead to absurd results, as people who are of average weight could bring ADA claims if their average weight was a result of a physiological condition.[25] Courts posit that a less restrictive interpretation of the guidance would also allow persons who are slightly overweight to be protected under the ADA.[26] Under all these lines of reasoning, severely obese people can only be protected by the ADA if their weight is the result of a physiological condition.

B. Considering Severe Obesity as an Impairment Would "Open the Floodgates"

Some circuit courts further believe that if severe obesity were to be considered an impairment it would open the ADA to a number of other physical conditions that "were not meant to be covered" by the statute. [27] The courts reason that when the door is opened to all the aforementioned physical conditions "it would debase this high purpose (the protection and empowerment of persons with disabilities) if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." [28] While not

[23] 29 C.F.R. Pt. 1630, App'x § 1630.2(h).
[24] Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1109 (8th Cir. 2016). See also EEOC *v. Watkins Motor Lines, Inc.,* 463 F.3d 436 (6th Cir.2006).
[25] Richardson, 926 F.3d 881, 890 (7th. Cir. 2019).
[26] *Id.* at 890.
[27] Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997).
[28] *Id*. at 286 citing *Forrisi v. Bowen,* 794 F.2d 931, 934 (4th Cir.1986).

stated in the caselaw, it could be hypothesized that courts are also worried about the increased number of persons that could bring a claim under the ADA.

C. The Definition of Impairment Suggests Severe Obesity is Not an Impairment

Finally, courts argue that a plain reading of the definition of impairment lends itself to the conclusion that severe obesity is not an impairment. The reasoning is that any weight, even when "outside the normal range" is strictly a physical characteristic, and not a physiological disorder or condition. [29] Courts add that by its very nature, an "abnormal" trait or physical characteristic cannot be considered physiological disorder. [30]

IV. Why Severe Obesity Should Be Considered an Impairment

A proper reading of the ADA suggests that severe obesity is an impairment regardless of whether it is caused by an underlying physiological disorder. More specifically, based on the definition of impairment, EEOC guidance, and the purpose of the ADA and ADAA, severe obesity in and of itself should be protected against discrimination. It will also further be argued that since severe obesity is nearly always caused by an underlying physiological disorder, the courts, as a matter of law, can treat severe obesity as an impairment.

A. The Definition of Impairment Suggests Severe Obesity is an Impairment

The first, and likely strongest reason severe obesity should, in and of itself, be considered an impairment is that it falls underneath one or more of the categories laid out in the EEOC's definition of impairment discussed in Part II-A. Namely, severe obesity is widely considered a physiological disorder, condition, or disease that affects the neurological, musculoskeletal, special sense organs, respiratory, or cardiovascular systems.[31] Over the years both the medical community and general population have begun to recognize severe obesity as a disease or condition, rather than a physical trait coming about by poor

[29] Richardson, 926 F.3d 881, 890 (7th. Cir. 2019).
[30] Francis, 129 F.3d 281, 287 (2d Cir. 1997).
[31] 45 C.F.R § 84.3 (j)(2)(i) (1997).

eating habits and a "lack of discipline and will power." [32] Furthermore, a common definition of severe obesity is that it is a "chronic, relapsing, multi-factorial, neurobehavioral disease." [33] Even in ruling that severe obesity by itself is not a physical impairment the court in *Richardson v. Chicago Transit* conceded that the medical community and profession, alongside "federal and state policy makers" are all generally of the opinion that obesity is a disease and "in and of itself a physiological disorder. [34] Finally, in the medical profession, "morbidity" refers to a disease or condition.[35] In separating individuals who have excess weight into three different categories and labeling one of those categories as "morbid", it is clear the medical community considers severe obesity a physiological condition.

Furthermore, severe obesity affects one or more of the bodily functions that are enumerated in the regulatory definition of impairment. In *Cook v. State of R.I., Dep't of Mental Health, Retardation, & Hosps*, expert testimony was presented that severe obesity "is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems."[36] More specifically, obesity leads to increased "blood pressure, low-density lipoprotein (LDL, or "bad") cholesterol, triglycerides, blood sugar, and inflammation", increases the chances of infertility, impacts one's ability to get adequate oxygen and places "strain" on bones, joints, and muscles.[37] In sum, science

[32]Melody Covington, *Why is Obesity a Disease,* Obesity Medicine Association (Feb. 8 2017), https://obesitymedicine.org/why-is-obesity-a-disease/.
[33] *Id.* citing the Obesity Medicine Association's definition. See also *Obesity,* Mayo Clinic (Sept. 2, 2021), https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742 offering a similar definition ("A complex disease involving an excessive amount of body fat").
[34] Richardson, 926 F.3d 881, 891 (7th. Cir. 2019).
[35] *Class III Obesity (Formerly Known as Morbid Obesity),* Cleveland Clinic (2021), https://my.clevelandclinic.org/health/diseases/21989-class-iii-obesity-formerly-known-as-morbid-obesity.
[36] Cook*,* 10 F.3d 17, 23 (1st Cir. 1993). See also Hazeldine v. Bev. Media, Ltd., 954 F. Supp. 697 (S.D.N.Y. 1997) where the court found that the plaintiff presented enough evidence to suggest that their obesity was (1) a physiological condition that (2) affected numerous body function laid out in the regulation/definition.
[37] *Obesity Prevention Source: Health Risks,* Harvard School of Public Health (Apr. 13, 2016), https://www.hsph.harvard.edu/obesity-prevention-source/obesity-consequences/health-effects/#:~:text=Excess%20weight%2C%20especially%20obesity%2C%20diminishes,heart%20disease%2C%20and%20some%20cancers. This article offers a more in-depth analysis and explanation of the specific bodily functions that obesity can affect.

and existing caselaw clearly indicate that (1) severe obesity is a physiological condition that (2) affects body systems expressly listed in the EEOC's definition of impairment.

This argument is potentially undermined, however, by the fact that nearly all that was written above can equally apply to obese and even overweight individuals This viewpoint is expressed in *Richardson,* where the court states that "The ADA is an antidiscrimination—not a public health—statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community." [38]They go on to explain that if they held that severe obesity is, by itself a physiological disorder, "then *all* obesity would be an ADA impairment" with nearly of 40 percent of the United States Population being protected under the ADA.[39] The above contentions are correct. The definition of impairment seems to include all forms of obesity. The consideration presented in *Richardson* that this would add over 100 million people to the protected class, however, is irrelevant when the definition is plain and clear. Through the ADAA and the change of the "regarded" as prong to only require a perceived impairment[40], Congress undoubtedly intended to increase the number of people in the protected class. Courts should not ignore a clear definition on the basis that it would add millions of people to the protected class. Rather, Congress should be charged with amending a statute if its plain meaning is not what it intended

B. <u>EEOC Guidance on Severe Obesity Suggests that it is an Impairment Whether or Not Caused by an Underlying Physiological Condition</u>

EEOC guidance also suggests that severe obesity must be considered an impairment in and of itself. It can be argued that a proper reading of the EEOC's regulation stating that the term "impairment does not include physical characteristics such as… weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder,"[41] only requires one's weight to be outside the normal range to be considered an impairment.

[38] Richardson, 926 F.3d 881, 891 (7th. Cir. 2019).
[39] *Id. at* 891.
[40] 42 U.S.C. § 12102 (3)(A).
[41] 29 C.F.R. Pt. 1630, App'x § 1630.2(h).

More specifically, and as briefly noted above, plaintiffs and some district courts have argued that "A careful reading of the EEOC guidelines and the ADA reveals that the requirement for a physiological cause is only necessary when a charging party's weight is within the normal range. However, if a charging party's weight is outside the normal range—that is, if the charging party is severely obese—there is no explicit requirement that obesity be based on a physiological impairment."[42] Not only does a plain reading of the guidance suggest that the above interpretation is correct, but one can look to other provisions of the ADA to reach this conclusion. For example, under the regarded as prong of the ADA, impairments that are "transitory and minor" are not protected.[43] Courts interpret this to mean that if the impairment is transitory but serious or if the impairment is long in duration but minor, then the individual is still protected under the regarded as prong. [44] Therefore, an individual need only meet the minor or transitory criteria to be protected under the regarded as prong. Applying the same reading to the EEOC's guidance suggests that one needs only be "outside the normal range" or have their "normal weight" be a result of an underlying condition, but not both.

The reading of EEOC guidance provided above is further strengthened by the EEOC compliance manual, which is the EEOC's own interpretation of its regulations. Courts have often deferred to the EEOC's interpretation of its own regulations when that regulation is "ambiguous."[45] The compliance manual supports the proposition that severe obesity is an impairment, whether or not it is caused by and underlying physiological condition. The most convincing and explicit piece of guidance provided by the EEOC states that that while "being overweight, in and of itself, is not generally an impairment … severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an

[42] E.E.O.C. v. Resources for Human Dev., Inc., 827 F. Supp. 2d 688 (E.D. La. 2011). See also Morriss, 817 F.3d 1104, 1109 (8th Cir. 2016); *Watkins Motor Lines, Inc.,* 463 F.3d 436 (6th Cir.2006) where plaintiff's advance similar arguments.
[43] 42 U.S.C. § 12102 (3)(B).
[44] Befort and Porter, *supra* note 11, at 81 (citing Silk v. Board of Trustees of Moraine Valley Community College, F. Supp. 3d 821, 829-30 (N.D. Ill. 2014).
[45] Taylor v. Burlington R.R Holdings Inc., 787 F.2d 1309 (9th Cir. 1986) (Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellants who cite *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008)).

impairment." [46] This explicit guideline is unsurprisingly either completely ignored in the circuit cases or hardly discussed. [47] The aforementioned statement by the EEOC is unambiguous and in my view should be weighed more heavily than any other piece of guidance. This is not the only guideline that seems to support the position advanced in this note. Two other relevant pieces found in the EEOC compliance guideline manual suggest that severely obese persons should not have to prove an underlying physiological cause. The first guideline states "the cause of a condition has no effect on whether that condition is an impairment," with the second adding "voluntariness is also irrelevant when determining if a condition is or is not an impairment."[48] As these two statements suggest, a severely obese individual should not have to prove a cause for their condition. Not only does no other impairment covered by the ADA carry this burden[49], but requiring severely obese persons to prove that they are not at fault for the bringing about of their condition would "epitomize the very prejudices and stereotypes which the ADA was passed to address." [50] More precisely, doing so would advance the notion that a severely obese person whose weight is not the result of an underlying condition is at fault and thus does not deserve protection. [51] Underlying causes or voluntariness play no part in the analysis and no physiological underlying basis must be proved.

The first response to the argument posited above is that the interpretation of the EEOC guidance advanced in this note would lead to absurd results, as people who are of average weight could bring ADA

[46] EEOC Compliance Manual § 902.2(c)(5). District courts that hold severe obesity in and of itself is an impairment heavily rely on this guidance. See Resources for Human Dev., Inc., 827 F. Supp. 2d 688 (E.D. La. 2011); Whittaker v. Am.'s Car-Mart, Inc., 1:13CV108 SNLJ, 2014 (E.D. Mo. Apr. 24, 2014).
[47] *Watkins Motor Lines, Inc.,* 463 F.3d 436 (6th Cir.2006) briefly mentions the guideline. Many courts, such as, Francis, 129 F.3d 281, 287 (2d Cir. 1997) and Lescoe v. Pennsylvania Dept. of Corrections-SCI Frackville, 464 Fed. Appx. 50 (3d Cir. 2012) do not acknowledge it.
[48] EEOC Compliance Guidelines § 902.2(e). Resources for Human Dev., Inc., 827 F. Supp. 2d 688, 694 (E.D. La. 2011) makes use of this argument.
[49] *Andrews* 104 F.3d 803 (6th Cir. 1997) (stating that there is no reason to believe voluntarily caused conditions are not covered. "The Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excess of various types, and the like").
[50] Resources for Human Dev., Inc., 827 F. Supp. 2d 688,694 (E.D. La. 2011).
[51] Jonathan C. Drimmer, Cripples, *Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities* 40 UCLA L. Rev. 1341-59 (1993) (excerpt found in Befort and Porter, *supra* note 11, at 5. This focuses on this discussion of medical and social models of interpretation).

claims if their average weight is a result of a physiological condition. However, it is entirely plausible that an employer prefers slightly heavier individuals and discriminates against a person who is of normal weight because of an underlying condition such as cancer.

Second, those who disagree with this note's interpretation on the EEOC guidance may argue that the discussion on the compliance manual is irrelevant, as it would directly contradict the EEOC regulation requiring obesity to be caused by an underlying disorder, and therefore making it "not entitled to the courts deference."[52] As noted above, however, courts have often deferred to the EEOC's interpretation of its own regulations when that regulation is "ambiguous."[53] Because the EEOC regulation that "an impairment does not include weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder"[54] can be considered ambiguous and subject to multiple interpretations the court should therefore give great deference to the EEOC's interpretation of that regulation provided in the compliance manual.

C. The Purpose of the ADA and the Americans with Disabilities Amendments ACT of 2008 Suggests Severe Obesity, in and of itself, should be an Impairment

Along with the definition of impairment and EEOC guidance, the purpose of the ADA and ADAA provide strong support for considering severe obesity, whether or not caused by an underlying physiological condition, an impairment. The purpose of the ADA is expressly stated. It was passed to (1)" to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,[55] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[56] and (3) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

[52] *Richardson*, 926 F.3d 881, 890 (7th. Cir. 2019) (citing Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1109 (8th Cir. 2016)).
[53] Taylor, 787 F.2d 1309 (9th Cir. 1986) (Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellants who cite *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008)).
[54] 29 C.F.R. Pt. 1630, App'x § 1630.2(h).
[55] 42 U.S.C. § 12101(b)(1)
[56] 42 U.S.C. § 12101(b)(2).

address the major areas of discrimination faced day-to-day by people with disabilities."[57] Overall, this statute was passed to protect those who are stigmatized and discriminated against. Severely obese persons have been labeled as "unsuccessful, unintelligent people" that tend to "lack self-discipline, have poor willpower, and are noncompliant with weight-loss treatment."[58] These inaccurate perceptions often lead to workplace discrimination. [59] Even more shocking is the fact that weight-based discrimination has risen by 66% over the last ten years. [60] Despite the pervasiveness of the incorrect stereotypes and the perpetuation of prejudice faced by severely obese persons, it is nonetheless permitted under the current judicial interpretation of the ADA to discriminate against them. [61] The ADA was enacted to protect highly stigmatized groups. Thus, the charge of the ADA would not be carried out if severely obese people are continuously discriminated against without protection from the law.

One can respond to the above assertion by pointing out that the ADA is an anti-discrimination statute against those with disabilities. It seeks to prevent discrimination against only those with a disability and obese persons are not impaired or disabled. While this is a valid assertion, the ADAA adds to the position outlined above. More specifically, the purpose of the ADAA was to expand the reach of the ADA and broaden the scope of coverage. The ADAA states that "the courts should provide protection to the maximum extent permitted."[62] Even conceding that classifying severe obesity as an impairment is questionable, the ADAA clearly instructs to take the approach that would extend coverage.

There are nonetheless arguments that the purpose of the ADA would be better served by not considering severe obesity an impairment. In Francis v. City of Meriden, the court notes that they did not want

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[57] 42 U.S.C. § 12101(b)(3).
[58] Rebecca M. Puhl and Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health, 100(6) Am J. Public Health 1019,1020*(citing Rebecca Puhl and Kelly Brownell. *Bias, discrimination, and obesity*, 9(12) Obes Res 788-805(2007); Kelly Brownell , Rebecca Puhl, Marlene Schwartz , and Leslie Rudd, *Weight Bias: Nature, Consequences, and Remedies*, American Psychological Association (2005). No page number, volume, or edition provided.
[59] Overweight and Underpaid: Weight Discrimination at Work, *supra note 4.*
[60] Puhl and Heuer, *supra note 58* (citing Tatiana Andreyeva, Rebecca Puhl, and Kelly Brownwell, Changes in Perceived Weight Discrimination among Americans, 1995-1996 through 2004-2006, 16(5) Obesity 1129 (2008)).
[61] Overweight and Underpaid: Weight Discrimination at Work, *supra note 4.*
[62]Befort and Porter, *supra* note 11, at 20 (citing 42 U.S.C.A. § 12102(4)(A)).

> to extend ADA protection to all "abnormal" (whatever that term may mean) physical characteristics. To do so "would make the central purpose of the statutes, to protect the disabled, incidental to the operation of the 'regarded as' prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed."[63]

Expanding the definition of impairment may undermine the rights of those who are already protected under that statute.

The above discussion on the ADAA can also be scrutinized. While the amendments may be construed to broaden coverage, courts have noted that the expansion was aimed at what is considered a major life activity, rather than what constitutes an impairment.[64] By taking a holistic view, however, the amendments can be seen as generally expanding coverage and targeting certain courts' conservative interpretation of the statute, rather than only addressing courts restrictive reading of the major life activity requirement.

D. Severe Obesity is Nearly Always Caused by an Underlying Physiological Disorder

In addition to the foregoing arguments, yet another reason for recognizing obesity an impairment is that it is nearly always caused by an underlying condition. Therefore, courts should rule that, as a matter of law, severe obesity is an impairment. Evidence suggests that severe obesity has "genetic and biological underpinnings." [65] More specifically, twin studies found that obesity can be inheritable and due to genetic factors and conditions in up to 70 to 80 percent of cases. [66] These figures infer that an underlying physiological condition is the likely basis of severe obesity in a sizeable number of individuals.

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[63] Richardson v. Chicago Transit Auth., 292 F. Supp. 3d 810 (N.D. Ill. 2017) (quoting *Francis*, 129 F.3d 281, 287 (2d Cir. 1997).
[64] *Morriss*, 817 F.3d 1104, 1111 (8th Cir. 2016).
[65] Ruth Loos and Giles Yeo. *The Genetics of Obesity: From Discovery to Biology,* 23 Nat Rev Genet 120–133 (2022).
[66] *Id*.; Chris Bouchard, *Genetics of Obesity: What We Have Learned Over Decades of Research*, 29 (5) Obesity 802-820 (May 2021).

The assertions posited above may be challenged in two ways. First, it could be argued that while underlying genetic and physiological conditions are prevalent, they are not recognized as the basis of obesity in about 30 percent of individuals. This is far too large of a number for courts to rule obesity an impairment as a matter of law. What this argument fails to consider, however, is that studies examining the underlying physiological or genetic causes of obesity are in their infancy.[67] Therefore, as more knowledge is gained about obesity and its causes, this number is sure to grow significantly.

Another critique to the arguments made above is that 70 percent of obese persons with underlying physiological and genetic conditions could merely get tested to prove it and that therefore, a blanket requirement considering severe obesity an impairment is unnecessary. This disregards however, the great costs associated with testing for an underlying physiological disorder and the fact that these tests may not be covered by one's insurance. [68]This would in turn tend to screen out individuals with disabilities.

[Policy Considerations and Conclusion Omitted]

[67] Loos and Yeo *supra* note 65; Bouchard, *supra* note 66; Rajan Singh et al., *Molecular Genetics of Human Obesity: A Comprehensive Review* 340 C.R Biologies 87, 100 (April 12, 2016).
[68] National Library of Medicine, *What is the Cost of Genetic Testing, and How Long Does it Take to Get the Results?* Medline Plus (July 2021).

Applicant Details

First Name	**Michelle**
Last Name	**Berger**
Citizenship Status	**U. S. Citizen**
Email Address	**mberger@jd24.law.harvard.edu**
Address	**Address** **Street** **900 Massachusetts Ave Apt 3** **City** **Cambridge** **State/Territory** **Massachusetts** **Zip** **02139** **Country** **United States**
Contact Phone Number	**6176806015**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Civil Rights-Civil Liberties Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court Competition (Qualifying Round)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Block, Sharon
sblock@law.harvard.edu
617-495-9265

Bowie, Nikolas
nbowie@law.harvard.edu
617-496-0888

Sachs, Benjamin
bsachs@law.harvard.edu
617-384-5984

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHELLE D. BERGER
900 Massachusetts Ave., Cambridge, MA 02139 | (617) 680 6015 | mberger@jd24.law.harvard.edu

June 19, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia PA 19106
Courtroom 14-B

Dear Chief Judge Sánchez,

I am writing to apply for a one-year clerkship in your chambers for the 2024-2025 term. I am a rising third-year student at Harvard Law School and an editor of the *Harvard Civil Rights-Civil Liberties Law Review*. Attached are my resume, transcript, and writing sample. The following professors are submitting letters of recommendation on my behalf:

Prof. Niko Bowie	Prof. Sharon Block	Prof. Ben Sachs
nbowie@law.harvard.edu	sblock@law.harvard.edu	bsachs@law.harvard.edu
(617) 496-0888	(202) 302-1801	(617) 384-5984

In addition, Gary Allen, the supervising attorney for the HLS Tenant Advocacy Project, is available at (617) 575-9595 to speak to both my legal acumen and my character. Attorney Christine Collins, who supervised me during my legal internship at the U.S. Department of Labor in Boston, is available to speak to my professional work at (617) 565-2522.

I intend to pursue a public interest career supporting workers' rights and civil rights. Prior to law school, I spent nearly three years at the Education Advisory Board, where I managed a team responsible for the research needs of public school district superintendents. As a law student, I advocate for tenants' rights in administrative proceedings. I also provide research assistance for several professors, engaging with legal scholarship and conducting historical legal research. Through internships at the Department of Labor, National Labor Relations Board, and Public Citizen Litigation Group I have gained extensive experience with research and writing.

I am happy to provide any additional information that would be helpful to you. Thank you for your consideration.

Sincerely,
Michelle Berger

Enclosures

MICHELLE D. BERGER

900 Massachusetts Ave., Cambridge, MA 02139
(617) 680 6015 | mberger@jd24.law.harvard.edu

EDUCATION

HARVARD LAW SCHOOL | Cambridge, MA
J.D. Candidate 2024

Honors: Best Appellant Brief (Section 3B) – First-Year Ames Moot Court Competition
Dean's Scholar Awards in Law and Political Economy; Legal Research and Writing (Spring)

Involvement: Lead Outside Articles Editor, *Harvard Civil Rights-Civil Liberties Law Review*
Tenant Advocacy Project
Research Assistant to Professors Niko Bowie, Ben Sachs, Matthew Stephenson, & Sharon Block
Independent Clinical Placement at the NLRB – Region 1
Research paper titled "Understanding the Illinois Workers' Rights Amendment"
Contributor to the OnLabor blog

THE GEORGE WASHINGTON UNIVERSITY | Washington, DC
B.A., *summa cum laude* in Sociology 2018

Honors: Phi Beta Kappa
Departmental Honors (for Sociology thesis)

Involvement: Forbidden Planet Productions (produced musicals and stage plays)
Metropolitan Studies Program in Berlin, Germany

EXPERIENCE

PUBLIC CITIZEN LITIGATION GROUP | Washington, DC
Summer Law Clerk Summer 2023

- Assist with legal research and drafting of memorandum for litigation in areas including administrative law, access to courts, and consumer protection.
- Draft a memorandum on *Chevron* in the Federal Courts of Appeals to support a Supreme Court amicus brief.

UNITED STATES DEPARTMENT OF LABOR – OFFICE OF THE SOLICITOR | Boston, MA
Pathways Student Trainee Summer 2022

- Conducted legal research for federal and administrative cases brought under the FSLA, OSH Act whistleblower provision, and ERISA. Drafted internal memos.
- Performed in-depth research using Westlaw and PACER to answer a challenging civil procedure question involving both state and federal law; subsequently drafted a motion for post-judgment remedy.
- Used Relativity to assist with e-discovery, identifying relevant documents for deposition preparation.

EAB (AN EDUCATION AND RESEARCH SERVICES FIRM) | Washington, DC
Research Manager 2020 – 2021
Research Associate 2018 – 2020

- Served public-sector clients, particularly public school district superintendents and their staffs.
- Scoped, launched, and supported research projects in response to client needs. Aligned projects with team strengths and capacity; managed client relationships; oversaw quality control.
- Authored recommendation-focused, 20-30 paged reports for public school district administrators. Many reports addressed achievement gaps experienced by students with disabilities, Black students, and low-income students. Also authored executive summaries, literature reviews, and data analyses.

UNITED STATES DEPARTMENT OF JUSTICE – CIVIL RIGHTS DIVISION | Washington, DC Winter 2017
Intern, Immigrant and Employee Rights Section

- Supported the enforcement of the Immigration and Nationality Act's anti-discrimination provision by analyzing subpoena production to identify evidence of discriminatory citizenship verification.

PERSONAL

- Road trip enthusiast aiming to visit all 50 states; avid consumer of world-building fiction and nonfiction such as Sci-Fi, memoirs, and investigatory journalism; appreciator of global cuisine.

Harvard Law School

Date of Issue: June 2, 2023
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Record of: Michelle Diane Berger
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 3 Greiner, D. James	P	4
1001	Contracts 3 Lessig, Lawrence	H	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	H	2
1003	Legislation and Regulation 3 Stephenson, Matthew	H	4
1004	Property 3 Brady, Maureen	P	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2
	Winter 2022 Total Credits:		2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 3 Bowie, Nikolas	H	4
1002	Criminal Law 3 Lewis, Christopher	P	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer * Dean's Scholar Prize	H*	2
1005	Torts 3 Ziegler, Mary	P	4
3133	Workshop on Law and Political Economy Benkler, Yochai * Dean's Scholar Prize	H*	2
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		36

Fall 2022 Term: September 01 - December 31

2000	Administrative Law Freeman, Jody	P	4
2142	Labor Law Sachs, Benjamin	H	4
2067	Organizing for Economic Justice in the New Economy Block, Sharon	H	2
3100	Readings in Reconstruction Lessig, Lawrence	H	2
	Fall 2022 Total Credits:		12

Fall-Spring 2022 Term: September 01 - May 31

3500	Writing Group: How Does Change Happen? Bowie, Nikolas	CR	1
	Fall-Spring 2022 Total Credits:		1

Winter 2023 Term: January 01 - January 31

2507	State Constitutional Law Sutton, Jeffrey	H	2
	Winter 2023 Total Credits:		2

Spring 2023 Term: February 01 - May 31

2651	Civil Rights Litigation Michelman, Scott	H	3
3094	Climate Change and the Politics of International Law Orford, Anne	H	3
8099	Independent Clinical - National Labor Relations Board Block, Sharon	CR	4
7000W	Independent Writing Bowie, Nikolas	H	2
	Spring 2023 Total Credits:		12
	Total 2022-2023 Credits:		27

Fall 2023 Term: August 30 - December 15

2025	Climate and Energy Law and Policy Freeman, Jody	~	4
2033	Conflict of Laws Singer, Joseph	~	4
2069	Employment Law Sachs, Benjamin	~	4
	Fall 2023 Total Credits:		12

Spring 2024 Term: January 22 - May 10

2050	Criminal Procedure: Investigations Griffin, Lisa Kern	~	3
2086	Federal Courts and the Federal System Fallon, Richard	~	5

continued on next page

Harvard Law School

Record of: Michelle Diane Berger

Date of Issue: June 2, 2023
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2169	Legal Profession: Understanding the Plaintiff's Attorney Rubenstein, William	~	3
2234	Taxation Kaplow, Louis	~	4
	Spring 2024 Total Credits:		15
	Total 2023-2024 Credits:		27
	Total JD Program Credits:		90

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.
~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Michelle Berger to be your clerk. I am excited to share with you my support for Michelle's application for a clerkship with you. I have had the opportunity to observe Michelle's work in a number of settings and have come to admire her dedication to studying the law for the purpose of pursuing social change. Even quick skims of Michelle's resume and transcript reveal the depth of her commitment to these issues and to taking advantage of all the opportunities that Harvard Law School provides to advance them.

I was fortunate to have Michelle as a student in a seminar I teach on ways that workers are organizing outside of the traditional labor movement. The class required extensive reading and synthesizing different kinds of accounts of worker power building. In every class we would analyze the theory of change represented by the activity of the workers at the center of that class's study, the legal support or challenge for the activity, and the practical impact of the activity. I was impressed by Michelle's ability to understand the conventional view of the theory at issue and to push both her colleagues and me to consider alternate interpretation or implications.

For example, one of the topics we discussed in class was the value of requiring corporations to include workers on their boards of directors. As you may know, this is an idea that has gained great currency among progressive labor advocates and policymakers, including Senator Elizabeth Warren. Many of the students in the seminar eagerly joined that viewpoint. Michelle, however, wrote a thoughtful short paper and expounded in class on her skepticism about the efficacy of board membership as a means of building worker power. I admired her tenacity in defending her perspective and the professionalism in the way she did so. I attribute this maturity in part to Michelle's pre-law school experience as a manager – not many of my students have that kind of background.

Michelle submitted an excellent paper and final project for the seminar. Based on the combination of her thoughtful contributions to class discussions and the superior quality of her paper and final project, Michelle earned an Honors grade in my class.

During this past year, I also had the opportunity to supervise Michelle's independent clinical experience at the Boston Regional Office of the National Labor Relations Board. Each week, Michelle submitted a report to me on her activities at the NLRB. It was clear to me from the kinds of assignments that she received that her supervisor and colleagues at the Board greatly valued her tenure among them. My intuition was validated when I received a stellar report from her supervisor at the end of the semester. During the course of her externship, Michelle garnered significant professional experience, including taking statements from charging parties and witnesses, writing legal memos on novel issues, and supporting trial attorneys.

Finally, Michelle has served as a research assistant on a project that I lead on labor law reform. Michelle's work on this research assignment has been truly outstanding. She reviewed all fifty state constitutions to analyze whether there would be any protection for collective bargaining rights in the absence of a federal law protecting those rights. In the face of a possible decision from the Supreme Court that could open up the legal space for state laws to regulate strikes or other worker collective action, this research is invaluable. I do not think that it is an exaggeration to say that Michelle is now one of the experts in the country on the topic of state constitutional provisions related to collective bargaining.

My observation about Michelle that may be most relevant for you is what a joy it is to work with her. She is thoroughly professional and demonstrates an impressive tenacity in her legal research. As a former member of the National Labor Relations Board, I care deeply about it as an institution. I was thrilled that Michelle brought her significant skills and legal acumen to working there and that she clearly made the most of the experience.

I have no doubt that Michelle would be a very positive presence in your chambers, not only because of her legal skills but also because of the quality of her character.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Sharon Block

Sharon Block - sblock@law.harvard.edu - 617-495-9265

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to enthusiastically recommend Michelle Berger for a clerkship in your chambers. Michelle is a wonderful writer and scholar of state and federal constitutional law. She is deeply committed to economic justice and has a stellar career in front of her—regardless of whether she decides to become a legal academic or a union organizer. Either way, she will be an excellent clerk.

I met Michelle when she took my constitutional law class in the spring of 2022. The class met three days per week, and toward the end of each class, I posed a question based on a current event that related to the material we just discussed. The questions asked students to offer their understanding of what is the law—say, by assessing a novel provision of the Infrastructure Act, how the president might constitutionally respond to Russia's invasion of Ukraine, or how a federal court might analyze Arkansas's ban on gender-affirming care. I also asked students to offer their understanding of what the law should be. Although the conversation would typically begin in class, most of it took place afterward on online discussion boards in which the students could respond to one another.

Michelle's responses to the daily questions were outstanding. She is a reflective, passionate writer, and her answers consistently demonstrated a strong desire to understand how existing legal doctrine could be used or changed to help working people. Although I don't think she had any formal background in legal theory before the semester began, she also was one of the few students in the class who introduced concepts from law review articles and ongoing conversations among legal academics. She cited a wide variety of perspectives in her answers while employing a sophisticated and nuanced understanding of the cases we were reading and discussing. Yet her answers weren't intimidating for the rest of the class, for whom a law review article might have come across as unapproachable. Instead, Michelle translated and explained the ideas she was thinking about, welcoming her classmates into the salon she was single-handedly developing on the discussion boards.

My eight-hour final exam asked students three questions. The first question asked how the Biden administration could modify its regulatory interpretations of the American Rescue Plan Act of 2021 in light of lawsuits challenging the Act's grant of aid to states (on ambiguity and coercion grounds) and "socially disadvantaged farmers" (on equal-protection grounds). The second question asked about the scope of the Biden administration's unilateral power to admit refugees. And the third asked students to analyze the recently leaked opinion in Dobbs and explain how the opinion might change constitutional doctrine beyond abortion bans.

In a class of 80 students, Michelle's final exam was in the top tier. Her analysis of the ARPA provisions was particularly strong. One of the ARPA provisions gave states money but prohibited them from using the money, "directly or indirectly," on tax cuts. Ohio contended that this provision was unconstitutionally ambiguous—potentially prohibiting the state from spending any money on tax cuts because money is fungible. Michelle disputed Ohio's characterization, responding that when the statute was read in context, it clearly didn't want states to spend ARPA funds on tax cuts. But she also responded that the Biden administration could clarify any ambiguities by "adopting accounting rules requiring that all funding recipients submit an itemized list of how recipients spent the funds. That way, the states can still lower taxes as long as they show all of the ARPA money went elsewhere." Her analysis of the "socially disadvantaged farmers" provisions was equally strong. Where some banks argued that this provision was unconstitutional racial discrimination, Michelle correctly observed that the statute did not define the term with reference to race. She therefore urged the Biden administration to implement the law by "adopting a case-by-case approach to determining whether particular racial or ethnic groups in a given area have experienced discrimination," which would create a classification based on discrimination, not one based on race.

I got to know Michelle better the fall of her second year when she enrolled in my year-long writing group, "How Does Change Happen?" Writing groups are relatively new at Harvard Law School; they began during the pandemic. I organize my writing group as a combination of a seminar and a writing workshop. In the fall semester, everyone writes an oped-length essay once per month. We then meet to collectively workshop the essays, offer feedback, and give everyone a chance to revise. In the spring semester, everyone writes a single paper of 5000–7500 words that can take the format of a law review article, long-form journalism, a strategic plan, or a memoir. We also read and discuss books on writing, like William Zinsser's On Writing Well.

Michelle's short essays were personal, moving, and well written. She wrote about her experience with the labor movement, growing up watching Star Trek, and how she was constantly grappling with answering the question of the writing group, "How Does Change Happen"? She arrived at law school thinking the answer to that question would be litigation, but she is now passionate that collective action through strikes, boycotts, and other forms of disruptive power are also instrumental to changing the law.

In her final paper, she interviewed labor leaders involved in a recent, successful effort to amend Illinois's constitution to guarantee the right of private- and public-sector workers to organize and collectively bargain. The people she interviewed were confident that the constitutional amendment was good for the labor movement and could inspire other states to constitutionalize labor protections in case the U.S. Supreme Court narrowly interprets the National Labor Relations Act. But Michelle worried that the focus on constitutionalization might lead unions to think their rights would be protected regardless of whether they thought about

Nikolas Bowie - nbowie@law.harvard.edu - 617-496-0888

how to continuously enforce them through supportive legislation and the political process. She argued that state constitutions are an important source of rights, but the labor movement should treat constitutional protections as the beginning, not the end, of efforts to break down unjust social hierarchies.

Michelle's paper included an impressive amount of research—in addition to interviews, she went through the archives of every state constitutional convention that has ever produced a workers' rights amendment. She is a confident writer, and her language is clear, direct, and relatable.

Michelle is an ideal candidate for a clerkship. She is passionate about constitutionalism, immersed in legal theory, an excellent writer, and a deep thinker about legal doctrine. I have no reservations about her ability to enrich a chambers with her legal talents and normative commitment to social justice. I recommend her with enthusiasm.
Sincerely,

Nikolas Bowie
Louis D. Brandeis Professor of Law
Harvard Law School

Nikolas Bowie - nbowie@law.harvard.edu - 617-496-0888

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write on behalf of Michelle Berger, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. Ms. Berger has my highest recommendation. She has been a student in two of my classes. She has worked as a research assistant for the center that I direct, and she also writes as student contributor for the blog that I edit. In each of these capacities, Ms. Berger has excelled. To all her work, Ms. Berger brings an impressive work ethic, a deep intelligence, and a genuine commitment to using law in the service of those who most need its protection. I have no doubt that Ms. Berger will make an outstanding law clerk.

I first met Ms. Berger when she was a student in my 1L reading group, The Struggle for Workers' Rights on Film during the Fall 2021 semester. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Ms. Berger was a leader in the reading group. She thought carefully and hard about all of the films we were discussing and the issues that they raise, and routinely offered insightful comments about labor and employment law questions presented by the movies. I remember in particular her comments about the legality and moral status of mine workers disrupting the production of coal, and asking whether there was an act analogy between the disruption of the strike and the inherent danger of employing coal miners to extract coal in the first place.

During the Fall 2022 semester, Ms. Berger was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Ms. Berger took Labor Law, there were approximately 90 students in the class, and Ms. Berger was among the strongest. Her exam was outstanding, displaying a deep command of both the doctrinal and theoretical material in the course, as well as a notable ability to draw connections among – and highlight contradictions between – different doctrinal areas. She easily earned an H grade in the course. Ms. Berger was also a leader in class discussions throughout the semester. She was thoroughly prepared for every class session and able to answer whatever questions I put to her with depth and accuracy. She also was a regular contributor to class debates, often offering a different perspective on the material under discussion. I particularly appreciated the way in which Ms. Berger brought her learning from other classes to bear on the debates in labor law, including, for example, her comments about state action doctrine, during our discussion of the agency fee cases. Also impressive was Ms. Berger's handling of a cold-call regarding some labor economics readings we had done. Although obviously not a course in labor economics, Ms. Berger was extremely well-prepared for the questions about this material and handled some very difficult material with agility and good humor.

Based on Ms. Berger's performance as a student in my classes, I asked her to work as a student contributor for OnLabor.org, a labor law blog that I edit. As a contributor, Ms. Berger writes the "News & Commentary" feature approximately once every two weeks, a task that involves consolidating large amounts of material into short pieces of writing that are clear, accurate and accessible. Doing this work successfully requires both clarity of thinking and strong writing skills –which Ms. Berger possesses in significant quantity. Indeed, Ms. Berger's posts are uniformly accurate and well-written. Ms. Berger has also volunteered to write substantive posts for the blog, including an important piece on a Ninth Circuit decision, reinstating an Equal Protection challenge brought by tech platform companies against a California law that would have classified their workers as employees. The legal issues in the case are complicated and even convoluted, and her writing brings clarity to a crucial and timely set of questions.

Ms. Berger also works as a research assistant for the Center for Labor and a Just Economy, which I am a faculty director. In this capacity, Ms. Berger has drafted a superb memorandum on the question of whether any state constitutions protect workers' rights to organize unions that would be of some effect in the absence of NLRA preemption. The memo was thoroughly researched, extremely well written, and exceedingly useful. I was also impressed by Ms. Berger's willingness and ability to revise the memo based on feedback from me.

Finally, I have had the opportunity to get to know Ms. Berger through office hours visits and through career advising. She is a pleasure to know and work with. She combines remarkable intellectual ability with both a deep commitment to public interest work and a genuine thoughtfulness about the issue she is studying. I have no doubt that Ms. Berger will make a terrific law clerk and a welcome addition to any chambers.

Thank you for your attention to Mr. Berger's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

Benjamin Sachs - bsachs@law.harvard.edu - 617-384-5984

Michelle Berger
Writing Sample

I wrote the following paper while enrolled in the course *State Constitutional Law* with the Honorable Jeffrey Sutton in January of 2023. My assignment was to craft a proposition inspired by the course and argue my point of view. In the months since, I have revised the paper in light of my continued reflections on this topic. I have never received feedback on this paper. Accordingly, this writing sample is entirely my own work and it is unedited by any person other than me.

Michelle Berger January 18, 2023

WORKERS' RIGHTS PROVISIONS IN STATE CONSTITUTIONS: A PITCH TO LABOR LAWYERS

I. Introduction.

As the 1800s drew to a close, tensions between American workers and their employers simmered. American capitalists' wealth and profits had skyrocketed during the "Gilded Age" following the Civil War. Enabling this growth, America's working class had toiled unrelentingly in hazardous conditions for poverty wages. As the Gilded Age ended and the Progressive Era began, the tide began to turn, and the new national labor movement of the 1900s achieved social and legislative victories for working people. In the following decades, the American labor movement succeeded in enacting state constitutional provisions that protected workers' rights.[1]

Some of these provisions protect individual employment rights; for example, by creating eight-hour workdays for public employees or by mandating that the legislature pass wage, hours, and safety laws.[2] Other state constitutional workers' rights provisions, however, protect *collective* workers' rights: the rights of workers to pool their power and resources, enabling them to bargain together for their wages, safety, and autonomy at work. The citizens of New York were the first to enumerate the right to bargain collectively in their state constitution,[3] and the citizens of Missouri followed,[4] as did the citizens of New Jersey;[5] Hawaii's citizens included the right to organize to bargain collectively in their first state constitution,[6] and, three decades after New Yorkers had

[1] *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 112–15 (2013).

[2] *Id*.

[3] N.Y. CONST. art. I, §17. Adopted 1938.

[4] MO. CONST. art. I, §29. Adopted 1945.

[5] N.J. CONST. art. I, §19. Adopted 1947.

[6] HAW. CONST. art. XIII. Adopted 1959.

started the trend, the citizens of Florida protected the right to bargain collectively in their state constitution.[7] Finally, just months ago, the citizens of Illinois voted to adopt a state constitutional provision that includes the right to bargain collectively.[8]

This Essay argues the following: Workers and their advocates who lived in the mid-20th century left behind legal tools buried in state constitutions in the form of collective bargaining rights provisions. Today's labor movement can and should unearth these tools to safeguard the rights of workers who fall outside of the protection of federal labor law.

II. Labor lawyers should bring claims under collective bargaining rights provisions in state constitutions to meaningfully impact workers' lives today.

Three arguments support this proposition: First, the coverage gaps of modern labor law provide a legal hook to invoke state constitutional rights to bargain collectively. Second, a legal theory grounded in well-established judicial principles can succeed in persuading courts to enforce state constitutional collective bargaining rights. And third, state constitutional collective bargaining provisions afford labor lawyers the opportunity to create legal regimes that avoid the pitfalls into which federal labor law has repeatedly fallen.

Start with the structure of modern labor law. Because the National Labor Relations Act ("NLRA") covers only certain categories of workers, state constitutional provisions granting collective bargaining rights remain enforceable in some contexts today. Enacted in 1935 and amended in 1947, the NLRA grants employees the right to join a union and bargaining collectively with their employer, as well as the right to refrain from doing so.[9] For workers subject to the NLRA, the Supreme Court has long held that this statute represents their sole

[7] FLA. CONST. art. I, §6. Adopted 1968.

[8] Amanda Vinicky, *Illinois Workers' Rights Amendment Approved by Voters: AP*, WWTW (Nov. 15, 2022, 3:57 pm).

[9] National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), codified as amended at 29 U.S.C. §§ 151–69 [hereinafter NLRA].

source of unionization-related rights; it preempts all state laws that enter its field.[10] But many workers fall outside of the NLRA's definition of "employees," to whom the Act applies.[11] The NLRA explicitly exempts agricultural workers, domestic workers, supervisors, and independent contractors from its coverage.[12] Other workers exempt from coverage include, inter alia, teachers at religious schools.[13] And the NLRA does not apply to workers in the public sector.[14] Thus, none of the workers in these categories (a non-inclusive list) enjoy federal statutory rights to bargain collectively with their employers. Accordingly, states are free to develop alternative regimes to regulate collective bargaining for some or all of these employees, whether through the legislature or the courts.[15]

Next, turn to the viable legal theories available to labor lawyers in the six states that recognize a constitutional right to bargain collectively. First, because these provisions evince that the right to collectively bargain is a fundamental right in these six states, workers' advocates can leverage equal protection principles to demand that all state collective bargaining laws apply to all categories of workers unprotected by federal labor law. A New York appellate court credited a version of that argument in the case *Hernandez v. State of New York*.[16] In that case, New York agricultural workers won judicial recognition that the state's labor laws must afford them the

[10] *See* San Diego Bldg. Trades Council v. Garmon, 259 U.S. 236, 244 (1959) (holding that the NLRA preempts state laws that attempt to regulate conduct regulated by the NLRA); Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Com'n, 427 U.S. 132, 150–51 (1976) (holding that the NLRA also preempts state laws pertaining to topics that the NLRA left unregulated deliberately); *see also* NLRB, STATE CONSTITUTIONAL AMENDMENT FACT SHEET (2011) (observing that the NLRA preemption regime applies to state constitutional provisions).

[11] NLRA §152(3).

[12] *Id.*

[13] *See* NLRB v. Cath. Bishop, 440 U.S. 490 (1979).

[14] NLRA §152(2).

[15] *See* Chamber of Commerce v. Seattle, 890 F.3d 769 (9th Cir. 2018) (holding that states may regulate collective bargaining by independent contractors in part because the NLRA did not intend to leave this category of workers entirely unregulated, so *Machinists* preemption does not apply).

[16] 99 N.Y.S.3d 795 (N.Y. App. Div. 2019).

same protections that the laws afford to other workers not covered by the NLRA.[17] As enacted, New York state's labor laws, like the NLRA, exclude agricultural workers.[18] The court reasoned, however, that New York's constitution recognizes labor rights as fundamental.[19] Accordingly, the court subjected a state labor law to strict scrutiny, and ultimately held that the statute's exclusion of agricultural workers from its definition of "employees" violated the New York state constitution.[20] *Hernandez*, then, demonstrates how labor lawyers in certain states can use state constitutional collective bargaining rights to protect and empower workers.[21]

There is also an alternative, and more foundational, legal theory available to labor advocates in states with constitutional protection for collective bargaining. This argument contends that, by recognizing the right to organize and bargain collectively, the legislatures in those states enlisted courts to fashion judicial remedies when employers violate those rights. This argument relies on the 'Marbury Principle:' the idea that for every right there is a remedy the right-bearer can seek when the right is violated.[22] Indeed, in light of this principle the Supreme Courts of New Jersey and Missouri have already interpreted those state constitutions' collective bargaining rights to be self-executing and enforceable against employers in some contexts.[23]

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[17] *See id.* at 115.

[18] *Id.* at 108.

[19] *See id.* at 113.

[20] *See id*. at 115.

[21] This argument requires a specific factual background: the state must protect the right to bargain collectively in its constitution *and* must have state laws that protect collective bargaining for some workers not covered by the NLRA, but not all of them. To identify such states, labor lawyers in the six states that protect the right to bargain collectively may wish to explore whether their state has a "Law Enforcement Officer Bill of Rights," a common state statute that protects aspects of collective bargaining and collective action by law enforcement officers specifically. *See Law Enforcement Officer Bill of Rights*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/law-enforcement-officer-bill-of-rights (last visited June 10, 2023).

[22] *See* Marbury v. Madison, 1 Cranch 137, 163 (1803)

[23] *See* Comite Organizador de Trabajadores Agricolas v. Molinelli, 552 A.2d 1003, 1008 (N.J. 1989) (observing that the New Jersey constitution's union rights provision "is self-executing and that courts have both the power and obligation to enforce rights and remedies under this constitutional provision"); *accord* E. Mo. Coal. of Police v. City

Third, the positive nature of state constitutional collective bargaining rights can afford labor lawyers the opportunity to ask state courts to furnish protections for workers that improve upon those available to workers under the NLRA. Scholar Emily Zackin defines positive rights along two related axes: One, positive rights guard against threats outside of the state.[24] Two, positive rights entitle the bearer to state interventions.[25] For evidence that state constitutional workers' rights are positive rights, look to the way 20th century workers described them: Workers advocating for state constitutional amendments insisted that, whereas the Federal Constitution secures negative rights (protecting property-holders from the government), they needed something different.[26] Workers' rights, they said, would protect "their lives, their limbs and their health;" would repudiate the notion that anyone had "the right to buy labor in the cheapest market;" would be "industrial rights."[27] Given this language, Zackin's two-part positive rights definition fits perfectly: state constitutional collective bargaining rights guard against the threat of exploitation by employers. And to that end, they entitle workers to government intervention.

A robust, uncompromising theory of worker protection from employer exploitation has never emerged under labor law at the federal level. In that context, the Supreme Court began to depart from the plain text of the NLRA less than a decade after it was enacted: instead of unflinchingly enforcing workers' positive statutory rights, the Court balanced them against employers' property rights.[28] In the nearly eighty years since, the Court has continued to chip

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of Chesterfield, 386 S.W.3d 755, 762 (Mo. 2012) (holding that the Missouri constitution's union rights provision is self-executing).

[24] *See* Zackin, *supra* note 1, at 40.

[25] *See id*. at 41.

[26] *Id*. at 116.

[27] *Id*. at 116–17.

[28] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) (balancing employee rights under the NLRA with the right of employers to maintain discipline, calling the later an "undisputed right" that is "essential" to "a balanced society").

away at workers' rights under the NLRA in order to accommodate employer interests.[29] State courts can chart a different path by recognizing that workers' rights under collective bargaining provisions abrogate at least some employer interests, because the rights afford workers state protection against private abridgement.

III. Arguments for ignoring collective bargaining rights provisions in state constitutions fail to neutralize the unique characteristics that make these provisions so powerful.

Parties opposed to bringing claims under workers' rights provisions in state constitutions may offer several arguments in support of their position. But each of these arguments proves unavailing.

One might argue that these provisions are only hortatory; they do not create legal entitlements cognizable in state courts. At first blush, this argument appears meritorious: many workers' rights provisions historically functioned to catalyze legislation and insulate it from judicial invalidation. In other words, these provisions served to circumvent the courts, not to empower them. With respect to the union rights provisions, when they lack effectuating statutes, one might argue that this argument closes the case: legislatures, not courts, must fashion state labor law regimes.[30] But this argument makes too much of the lack of effectuating statutes. After all, in some state constitutional provisions intended *solely* to precipitate legislation, language qualifies the enumerated rights "as defined by law."[31] No such qualifying language appears in these provisions. Rather than hortatory, then, these provisions — as noted *supra* — are best understood as positive constitutional rights. And more fundamentally, as the Supreme Court of

[29] *See* Lechmere, Inc. v. NLRB 502 U.S. 527 (1992) (applying the *Republic Aviation* balancing approach to limit union organizers' access to workers); *see also* Cynthia Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (criticizing the *Lechmere* Court for privileging employer property rights without support from the text or context of the NLRA).

[30] *See* Alexander MacDonald, *Bargaining Rights Gone Wrong: How State Courts Invented a Constitutional Duty Bargain and How It Harms Individual Workers*, 23 FED. SOC'Y REV. 41 (Apr. 11, 2022) (articulating this argument).

[31] *See* E. Missouri Coalition of Police, 386 S.W.3d at 762.

New Jersey has stated when recognizing the enforceability of state constitutional rights: "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence."[32] Indeed, the "judicial obligation to protect the rights of individuals is as old as this country."[33] Positive constitutional rights entitle the bearer of the right to protection from non-governmental actors, such that state courts can and should enforce these rights.

Moreover, state courts are entirely competent to hear and decide cases arising under workers' rights provisions. State courts in New Jersey and Missouri have proven as much by enforcing these provisions.[34] Indeed, state courts are no stranger to the legal issues surrounding the relationships between employer and employee; common law still governs many corners of employment relationships. Unable, then, to articulate a reason why workers' rights provisions pose questions that only legislatures can answer, the argument that state courts should not enforce workers' rights provisions cannot withstand scrutiny.

One might also urge caution in bringing claims under these provisions on the theory that, if state courts craft strong regimes under workers' rights provisions that protect workers better than the NLRA does, then these state court decisions could expose the provisions to challenges under the Federal Constitution. This argument takes its cue from *Cedar Point Nursery v. Hassid*,[35] in which the Supreme Court held that a California labor regulation granting union organizers access to farmland was a Taking under the Fifth Amendment. Extending this logic, one could argue, any interpretations of workers' rights provisions that interfere with employer property rights would also constitute a violation of the Takings Clause of the U.S. Constitution

[32] Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 644 (N.J. 1961)

[33] *Id.* (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

[34] See note 22, *supra*.

[35] 141 S.Ct. 2063, 2080 (2021).

(and state analogs). For example, the argument goes, state courts could not protect union organizing via employer-provided email addresses — an innovation which labor advocates might wish to incubate at the state level, since the NLRA does not protect such activity.[36] This argument, however, is vulnerable to two responses. One, states may be able to cure any Takings Clause violations with nominal damages. Two, from the pragmatic perspective of a labor lawyer, the NLRA is so deeply flawed that even state innovations constrained by the Fifth Amendment could prove an enormous improvement. This is particularly true with respect to remedies for rights violations: Congress and the Supreme Court have circumscribed the remedies available under the NLRA, but workers' rights constitutional provisions need not be read to contain any such limitations.[37]

Finally, some within the labor movement might bristle at the prospect of diverting time, money, and movement-wide focus from the national stage to the states. This position might reflect some hesitation to entrust state courts — known in the 1800s and early 1900s as keen to issue anti-union injunctions — with labor law; it might reflect doubts about the utility of focusing on the small number of states with workers' rights provisions; or it might reflect the sentiment that a national labor movement needs a national statute. But one advocating this position must confront incisive counterarguments. With respect to anti-union judicial acts, state constitutional workers' rights provisions could serve as a *defense* against any such judicial impulse. And while it is true that not all states have workers' rights provisions, those that do are home to millions of people. Moreover, as noted *supra*, just months ago the number of states with

[36] *See* Rio All-Suites Hotel & Casino, 368 NLRB No. 143 (2019).

[37] *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–12 (1940) (observing that the NLRA does not authorize penalties for deterrence or retribution); Wis. Dept. of Indus., Lab., & Hum. Rels. v. Gould, Inc., 475 U.S. 282 , 288 n.5 (1986) (describing punitive sanctions as "inconsistent" with NLRA's "remedial philosophy").

collective bargaining rights in their state constitution grew by one, and this number could continue to grow. Finally, with respect to sentimentality about the national labor movement, one must acknowledge that successful national movements — including movements of enormous consequence for individual rights — have charted a path that started in the states.[38]

IV. Conclusion.

In sum, much about collective bargaining rights provisions in state constitutions suggests that labor lawyers should use them: modern labor law leaves gaps for them to fill, viable legal arguments can convince state courts to enforce them, and as positive rights they have the potential to reshape the balance of power between workers and their employers. In contrast, arguments against leveraging state constitutional collective bargaining rights provisions fall flat: our constitutional structure obligates the judiciary to enforce rights, the threat of the Federal Takings Clause need not stifle all state-level innovation to federal labor law, and shifting from a national- to state-level focus still promises to affect the lives of millions of workers. Pundits sometimes describe the United States today as a New Gilded Age — a period characterized by widening inequality between the ultra-wealthy and those struggling to keep their heads above water. How fitting, then, that the very tools which evolved at the end of the last Gilded Age would resurface now.

[38] *See generally* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022).

Applicant Details

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Contact Phone Number	**614-378-7985**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**December 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**N.Y.U. Journal of International Law & Politics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rachel Bernard
32 Belvidere St., Apt. 3R
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June 15, 2023

The Honorable Juan R. Sánchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sánchez:

I write to apply for a 2024-25 term clerkship with your chambers. I have recently completed my second year of law school at New York University School of Law, and I expect to graduate in May 2024.

The Jewish precept of "*tzedek, tzedek tirdof*"—justice, justice you shall pursue—has long guided my passion for the law and taking direct action to balance the scales of justice. It is this core value which drives my desire to clerk with Your Honor, and my experiences thus far have set me up for success in this aim.

For nearly a decade now, I have both researched and worked directly on key human and civil rights issues, including numerous independent research projects covering topics such as transitional justice and the intersection of justice and public policy. This has afforded me unique exposure to new and traditionally unheard voices, and shaped my approach to human and civil rights fights.

My work between undergrad and law school allowed me to apply my studies to real life situations. For example, at Vital Voices Global Partnership, I learned practical ways to engage with local actors in a meaningful way, including how to bring seemingly opposing sides to the same table. Working at the Center for Strategic and International Studies allowed me to learn how to communicate dense, technical topics to a wide range of audiences. This is a crucial skill I have, as our courtrooms are filled with and meant to deliver justice to everyone in our country, regardless of their background or how they got there. Further, my time in the service industry allowed me to develop strong time management skills, as well as mastering how to balance multiple "projects" (or tables) at the same time. On top of that, I was able to build strong communication skills and learn how to work effectively and efficiently with a wide variety of people.

My research and writing experiences, along with internships and journal work, will make me an effective judicial clerk. Please find attached my resume, transcripts, and writing samples. The first writing sample is a paper I submitted for a strategic human rights litigation seminar. I have included the entire piece for context, but, for a short representative sample, see Section III on pages 11-21. The second writing sample is jurisdictional memorandum I prepared for my Investment Treaty Arbitration seminar. NYU is attaching recommendations from: Professor Mindy Nunez-Duffourc, with whom I took a class; Professor Philip Alston, for whom I was a Research Assistant and also with whom I took a class; and Angelina Fisher, the director of the special scholars program I am in and the supervisor of my current directed research.

Please let me know if I can provide any additional information. I appreciate your consideration, and I look forward to speaking with you soon.

Sincerely,

Rachel Bernard

RACHEL BERNARD

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: Institute for International Law and Justice Scholar (merit-based scholarship awarded to twelve students)
N.Y.U. Journal of International Law & Politics, Managing Editor
Activities: Trial Advocacy Society, President, Internal Competition Co-Chair and Competition Team Member
OUTLaw, Member and Facilitator
UN Diplomacy Clinic, Student Legal Policy Advisor (Fall 2023)

AMERICAN UNIVERSITY, Washington, DC
B.A. in International Studies, minor in Justice and Law, *summa cum laude*, December 2017 (graduated in seven semesters)
Senior Thesis: *Screaming into the Void: The Bosnian Genocide and How the United States Avoided Intervention Under the Guise of Ethnic Cleansing*
Addtl. Research: "Resistance to Protect: State Strategy and NGO Pressures in Responses to Genocide"
Honors: Phi Beta Kappa; University Honors Program; AU Presidential Scholarship; School of International Service Dean's List; Sigma Iota Rho – International Relations Honors Society
Activities: American University Mock Trial, Competition Team Member

EXPERIENCE

KING & SPALDING, New York, NY
Summer Associate, Trial and Global Disputes Practice Group, May – July 2023
Research and draft section of counter-memorial in representation of state respondent in ICSID international arbitration case concerning mining concession. Analyze precedent and prepare memo on Inter-American Commission on Human Rights and Inter-American Court cases addressing patterns of violative government practices. Conduct state survey of anti-transgender legislation regarding drag bans, "Don't Say Gay," and book bans for pro bono matter.

PROF. PHILIP ALSTON, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, September – December 2022
Conducted research on responses to mass atrocities for new edition of the International Human Rights casebook. Prepared literature review of scholarly works on modern approaches to reparations for human rights violations.

GENEVA CALL, New York, NY
International Law and Human Rights Fellow, May – August 2022
Led coordination with NGOs and state actors in NY working on child protection and healthcare in conflict. Represented organization at roundtables and planning sessions, including the UN Security Council High-Level Open Debate on Children and Armed Conflict. Created thematic legal sheets focused on landmines and forced displacement under international law.

JENNINGS, STROUSS & SALMON, Washington, DC
Administrative Legal Assistant, April 2019 – June 2021
Led case organization, performed legal research, and maintained client research projects for two senior partners. Drafted and filed a large variety of pleadings, including interventions and motions, at the regulatory and appeals levels. Maintained client databases and discovery repositories. Proofed and cite-checked legal documents and client memos. Developed digital organization system to improve work product consistency and team efficiency.

VITAL VOICES GLOBAL PARTNERSHIP, Washington, DC
Intern, Human Rights Team, August – December 2017
Conducted civil and legal research on local laws and culture in preparation for three international workshops held in West Africa and Eastern Europe. Oversaw sensitive information related to key international women's emergency assistance cases. Organized post-workshop participant surveys; assisted the evaluation and feedback processes.

DISTRICT OF COLUMBIA OFFICE OF THE ATTORNEY GENERAL, Washington, DC
Intern, Public Interest Division, September – November 2015
Worked closely with Assistant Attorneys General on a wide variety of civil and criminal cases. Conducted legal research and prepared legal briefs, questions for depositions, and case memoranda. Assisted with trial preparations.

ADDITIONAL INFORMATION

Conversational fluency and business proficiency in Spanish. Additional full-time employment as a server, lead trainer, and bartender at Lia's Restaurant (May 2017 – March 2020). Enjoy recreating recipes from favorite cooking competition shows.

Name:	**Rachel E Bernard**
Print Date:	**06/05/2023**
Student ID:	**N15415155**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Mindy Nunez Duffourc			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Anna N Roberts			
Torts	LAW-LW 11275	4.0	B
Instructor: Daniel Jacob Hemel			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Philip G Alston Grainne de Burca			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Mindy Nunez Duffourc			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Samuel J Rascoff			
International Law	LAW-LW 11577	4.0	B+
Instructor: Jose E Alvarez			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Clayton P Gillette			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

European Human Rights Law Seminar: Writing Credit	LAW-LW 10457	1.0	A-
Instructor: Helene Tigroudja			
European Human Rights Law	LAW-LW 11601	2.0	A-
Instructor: Helene Tigroudja			
Property	LAW-LW 11783	4.0	B
Instructor: Cynthia L Estlund			
International Humanitarian Law	LAW-LW 12259	4.0	B+
Instructor: Ryan Goodman			
Investment Treaty Arbitration	LAW-LW 12344	2.0	A-
Instructor: Donovan B King			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff Arthur R Miller			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Jeffrey A. Udell			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Maggie Blackhawk			
Strategic Human Rights Litigation Seminar	LAW-LW 12531	2.0	A
Instructor: Philip G Alston James Andrew Goldston			
Directed Research Option B	LAW-LW 12638	1.0	IP
Instructor: Angelina Fisher			

	AHRS	EHRS
Current	13.0	12.0
Cumulative	56.0	55.0

Staff Editor - Journal of International Law & Politics 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to strongly recommend Rachel Bernard for a clerkship in your chambers. As Rachel's professor in the Lawyering Program at NYU School of Law, I had an opportunity to observe Rachel both in class and in a variety of different simulation environments that test diverse professional and interpersonal skills. Rachel demonstrated superb research and writing skills and critical thinking ability in my class. Not only did she produce excellent work, but she was also diligent and dedicated, and demonstrated professionalism and attention to detail. Based on my extensive experience instructing Rachel (and as a litigator for 12 years), I am confident that she would be a valuable asset in your chambers.

The Lawyering Program—unlike students' other first-year courses—is a year-long, simulation-based practice-skills course with less than 30 students per class. In this course, students operate within small teams, critique each other's work, and receive detailed feedback on a range of skills, including interviewing and counseling clients; conducting legal research and factual due diligence; drafting objective memoranda, persuasive briefs, and contracts; and providing oral presentations and legal arguments.

Rachel's performance in my class was exemplary. In her research, she was able to quickly establish an in-depth and thorough understanding of the relevant law and identify issues that others missed. In her writing, Rachel was able to convey complex and nuanced content in a clear and succinct manner. In every assignment and simulation, Rachel emerged as one of the best students in my class. She has an impressive capacity for working independently, but she also recognizes when her work would benefit from further discussion. In these times, she proactively organized meetings and came to my office prepared and ready to discuss her work, asking insightful questions and diligently absorbing and incorporating my feedback. On a more personal note, Rachel has been a joy to teach. She always remained engaged and thoughtful in our class discussions, and I am certain that she would serve your chambers well and make the term a genuine pleasure.

In sum, everything I have learned about Rachel during her time as my student leaves no doubt in my mind that she would make an excellent law clerk, and I strongly recommend her to you. If I can be of any further assistance in your deliberations, please do not hesitate to contact me at mindy.duffourc@nyu.edu.

Sincerely,

/s/ Mindy Nunez Duffourc
Acting Assistant Professor
New York University School of Law

Angelina Fisher
Director, Policy & Practice
Adjunct Professor Law
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New York, NY 10012
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June 5, 2023

Letter of Recommendation for Rachel Bernard, NYU Law Class of 2024

Dear Judge,

It is with great pleasure that I am writing to recommend Rachel Bernard for a clerkship position in your chambers. Rachel's commitment, drive and initiative, strong research and writing skills, work ethic and friendly personality will make her a perfect fit for the dynamic and collaborative environment of a judicial clerkship.

I got to know Rachel first when she applied to the Joyce Lowinson Scholars Program at the Institute for International Law and Justice (IILJ Scholarship Program). The IILJ Scholarship Program is a highly selective program for students with outstanding academic backgrounds and strong international, transnational, and comparative law interests. Each year I review approximately 70 applications from which I ultimately select a handful of students. Rachel impressed immediately. Apart from her stellar credentials, she has a strong commitment to justice, which guided her decision to come to NYU Law.

A big component of the IILJ Scholarship Program is one-on-one mentorship. Rachel and I met regularly to discuss her research interests and career trajectory. She is very thoughtful about her path, never wavering in her commitment to international humanitarian law and justice but also mindful of the need to develop a multifaceted and multidisciplinary understanding of issues. Her course selection enabled her to acquire deep knowledge of international and regional human rights law and institutions, as well as of private law instruments and regimes that are implicated in human rights violations and redress. She has also made sure that her curriculum allows her to develop and sharpen analytical, research, as well as litigation skills. When Rachel approached me to ask whether I would co-supervise (with Professor Jennifer Trahan) her independent research analyzing the development of states' obligation to prevent genocide through the lens of International Court of Justice (ICJ) jurisprudence, I agreed without hesitation.

In her paper, Rachel argues that there is a trend in the ICJ jurisprudence to require states to take a more proactive role in genocide prevention, articulating an obligation to act affirmatively to prevent and suppress any attempts to commit genocide. She engages in close reading of the pleadings, interventions, and decisions of the court, but then goes further to analyze whether United Nations legislative bodies (General Assembly and Security Council) and the ICJ would still be appropriate *fora* for recourse under a more positive obligation to prevent genocide. Rachel is a very thorough researcher and her tenacity to leave no stone unturned ensures that her written product is very well-researched, but also rightfully attuned to the importance of considering politics of institutions. Rachel's project exceeds the scope of a typical semester-

long directed research, and rather than compromise on its depth and breadth, Rachel chose to take an "incomplete" to invest extra time and effort. Both Professor Trahan and I supported this approach, knowing Rachel's determination to produce the best possible work product.

On a personal level, Rachel is very personable and thoughtful. She is a planner by nature and is not afraid to seek advice or help, without being too imposing. Despite experiencing some personal challenges, she managed to perform very well academically and outside of classes. I have no doubt that she will continue to excel in your chambers.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Angelina Fisher
Adjunct Professor of Law
Program Director, IILJ
Policy & Practice Director, GGLT

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of the application by Rachel Bernard for a judicial clerkship. I got to know her well in several different contexts. She was a member of a 1L Reading Group, a research assistant, and a student in a seminar that I co-taught last semester.

First, she was a member of the 1L Reading Group that I taught with my colleague Prof. Grainne de Burca on the subject of Human Rights Accountability in Practice. That involved a small group of students meeting in my home four times during the semester to read carefully selected materials and then engage in in-depth critical discussions, structured around pre-set themes. Rachel was one of the most engaged and thoughtful members of the group and was extremely conscientious.

Second, I hired Rachel as a research assistant during the fall semester of 2022. She worked with me to gather materials and suggest possible themes in preparation for a new edition of a casebook on International Human Rights Law. Her work was excellent, although I confess to being so busy that semester that I probably didn't make as good a use of her time as I should have.

Third, she enrolled in a seminar on Strategic Human Rights Litigation that I co-teach with James Goldston. He is the Executive Director of the Open Society Justice Initiative which is probably the world's largest public interest group working on strategic litigation to promote respect for international human rights standards. While the seminar focuses on cases from around the world, there is also an important U.S.-based component, and students are free to write on a very wide range of topics. Rachel again proved to be a very smart and engaged student, but it was her research paper that really stood out from almost all of the others. Prof. Goldston and I awarded her an A, the highest grade given in the seminar.

The paper provided a clear and thoughtful discussion of the recent history of Alien Tort Statute litigation in the Supreme Court, and the potential to use state courts to enforce civil actions in non-US courts to address human rights violations. The paper describes "the gutting of the ATS" by analyzing the ways in which a series of Supreme Court rulings over the past two decades have has "dramatically narrowed" victims' ability to invoke the ATS as a cause of action. The paper is very thoroughly researched, and clearly and concisely written.

Rachel has consistently demonstrated a very high order of legal research and writing skills, excellent judgment, and a critical but nuanced approach. I have no doubt that she would make an excellent law clerk and I have no hesitation in recommending her very highly.

Sincerely,
Philip Alston

Philip Alston - philip.alston@nyu.edu - 212-998-6173

RACHEL BERNARD
(614) 378-7985 | rachel.bernard@nyu.edu

Writing Sample

This is a paper I researched and wrote for my Strategic Human Rights Litigation seminar in Spring 2023 with Prof. Philip Alston and James Goldston (Executive Director, Open Society Justice Initiative). The assignment was to write a paper on a topic of our choosing, as long as it was related to an aspect of strategic human rights litigation. For this, I chose to evaluate the current status of the Alien Tort Statute (ATS), and explore an alternative to the ATS in U.S. courts for victims of human rights violations seeking justice. This is wholly my original work product. I have included the paper in its entirety, but for a shorter excerpt, I would direct you to Section III (pp. 11-21), discussing the enforcement of foreign judgments in U.S. courts.

SEEKING OUT FRIENDLIER SKIES:
USING FOREIGN JUDGMENTS IN STATE COURTS TO AVOID THE EXTRATERRITORIALITY PITFALL

Rachel Bernard

I. INTRODUCTION

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] For all of the attention that the Alien Tort Statute (ATS) receives now, the simple clause began in relative obscurity as one of many provisions in the Judiciary Act of 1789.[2] From there, it remained virtually untouched for nearly two centuries, until it exploded in popularity following the landmark decision in *Filártiga v. Peña-Irala*, where the Second Circuit Court of Appeals held that the District Court

[1] Alien Tort Statute, 28 U.S.C. § 1350.
[2] Judiciary Act of 1789, 1 Stat. 73, 77, § 9 (1789). The ATS has been slightly revised and recodified a handful of times since its initial enactment, including being separated from the rest of the Judiciary Act of 1789. The current version, enacted in 1948, is codified at 28 U.S.C. § 1350. For a overview of the early history of the ATS, see, e.g., CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 209-214(3rd ed. 2020), and STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, ALIEN TORT STATUTE: A PRIMER 2-6 (2022), both of which cover from 1789 until approximately 1980.

had universal jurisdiction over violations of "the law of nations" (in this case, the *jus cogens* prohibition on torture).[3] Over the subsequent decades, federal courts saw numerous cases brought before it in attempts to hold human rights violators accountable for their actions,[4] including successful suits against brutal foreign dictators or war criminals when there were no other remedies available.[5] The powers of the U.S. federal judiciary were open to adjudicating human rights violations from anywhere in the world, so long as personal jurisdiction over the defendant could be established.[6]

For all of the possibilities available following the *Filátarga* decision, the actual impact of the ATS in the almost half of a century since has been anything but great. From its inception through June 2021, there have been 531 published opinions citing the ATS as a cause of action.[7] Out of those published opinions, only 52 cases—less than 10% of the opinions—resulted in favorable judgments for the plaintiffs; only about half of those cases had perfected monetary judgments that were not subsequently overturned.[8] This is not to suggest that the only mark of whether the ATS can be considered a success is the ability to collect monetary compensation. In fact, many plaintiffs are looking for answers about what happened to loved ones or seeking and

[3] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
[4] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 2 (2018).
[5] *See, e.g.*, Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996) (affirming a judgment against the Philippine dictator that awarded Filipino victims nearly $2 billion in total damages); Kadic v. Karadzic, No. 93-CV-1163 (LAP), 2020 WL 8512862 (S.D.N.Y. Dec. 9, 2020) (renewing a judgment against the former president of Republika Srpska for $745 million in damages); Tachiona v. Mugabe, 234 F.Supp.2d 401 (S.D.N.Y. 2002) (entering a modified judgement against dictator Robert Mugabe's ruling party in Zimbabwe for over $71 million in total damages).
[6] CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 216 (3 ed. 2020).
[7] Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1240 (2022).
[8] *Id.* at 1241, 1250.

admittance of fault.[9] However, unless a plaintiff's only goal is to merely file the suit, they are likely to walk away from the process with at least some disappointments.

In particular, beginning with the Supreme Court's opinion in *Sosa v. Alvarez-Machain*[10] in 2004, the ability of victims to properly invoke the ATS as a cause of action has dramatically narrowed. Part II of this paper traces the substantive gutting of the ATS over the last twenty years, taking care to focus on four key Supreme Court cases that each significantly cut away at the ATS' applicability. In light of these emerging limitations, this paper then briefly turns to commonly invoked alternatives to the ATS, and examines why they are inadequate substitutes for claims that were previously covered under the ATS. Part III argues that, rather than search for a patchwork of federal domestic causes of action, plaintiffs could (and, arguably, should) instead go to a foreign country jurisdiction to obtain judgments before returning to the United States for recognition and enforcement, thus evading the thorny issues caused by the presumption against extraterritoriality. Though the United States is dramatically reducing opportunities for prosecute human rights violations in its courts, many other countries are moving in the opposite direction and expanding these opportunities. It is time these opportunities were taken advantage of.

II. CURRENT STATE OF AFFAIRS

A. *The Gutting of the ATS*

1. Sosa v. Alvarez-Machain: Specific, Universal, and Obligatory

Following an explosion of ATS litigation stemming from *Filártiga*, *Sosa* marked the first time the Supreme Court began to impose outer limits on this area of law. Notably, the Court held that the ATS is a strictly jurisdictional statute that does not, in and of itself, define a cause of

[9] *Id.* at 1244–1247, 1253–1256 (discussing normative aims in ATS litigation, including interviews with both lawyers and plaintiffs).
[10] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

action.[11] Rather, at the time of its enactment, the ATS was understood to govern a limited number of violations of the "law of nations."[12] Looking at historical analyses and legislative history to understand what this meant when the ATS was enacted in 1789, the Court determined this to include crimes against ambassadors, violations of safe conduct,[13] and piracy.[14] However, the Court also held that there was some—albeit incredibly limited—room for judges to include other common law claims under the ATS umbrella.[15] Any claim based on a modern understanding of the law of nations must "rest on a normal of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[16] This being said, the Court actively cautioned against applying that standard too broadly, urging judges to show "restraint" in their analysis of new common law causes of action under the ATS.[17]

Thus, the Court established its first test for assessing liability under the ATS. First, the court must inquire into whether the plaintiff can show the alleged violation is "of a norm that is specific, universal, and obligatory."[18] If there is, then the court needs to determine whether allowing such a case to proceed under the ATS is an appropriate exercise of judicial discretion (as opposed to requiring a greater expansion of the court's jurisdiction by Congress first, because of separation of powers concerns).[19]

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[11] *Id.* at 713–14.
[12] *Id.* at 720.
[13] A safe conduct is a "privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose." *Safe Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[14] *Sosa*, 542 U.S. at 724 These torts are often referred to as "Blackstone torts" given their roots in English common law, as described in 4 WILLIAM BLACKSTONE, COMMENTARIES *68.
[15] *Id.* at 724–25 ("We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filártiga v. Pena–Irala* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law . . .").
[16] *Id.* at 725.
[17] *Id.*; STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, ALIEN TORT STATUTE: A PRIMER 11 (2022).
[18] *Sosa*, 542 U.S. at 732 (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 [C.A.9 1994]).
[19] *Id.* at 732–33 and nn.20–21.

2. Kiobel v. Royal Dutch Petroleum Co.: Touch and Concern

Not even a full decade later, the Court was again confronted with a question about the ATS' reach. In *Kiobel*, the Court examined the interaction of the ATS and principles of extraterritoriality, looking at whether the ATS conferred jurisdiction over violations occurring on foreign, sovereign soil.[20] In this case, traditional canons of statutory interpretation governed the majority's analysis; in particular, the Court relied on the "presumption against extraterritorial application" canon.[21] This canon leads courts to "interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary."[22] To support this analysis, the Court suggested that the extraterritorial applicability of the ATS was really a matter covered by the political question doctrine.[23] As a result, the majority held that the ATS does not extend to causes of action when "all the relevant conduct took place outside the United States."[24] The door is not completely shut on extraterritorial application, as the Court does allude to the possibility of rebutting the presumption against extraterritoriality when "the claims touch and concern" U.S. territory "with sufficient force."[25] Even now, though, it is unclear what exactly this means and how a judge might evaluate whether or not this standard is sufficiently met to rebut the presumption.[26]

Interestingly, despite certiorari being granted on the issue of whether the ATS extended liability to corporations, the Court only answered the extraterritoriality question for now.[27] Two

[20] MULLIGAN, *supra* note 17, at 12.
[21] *Id.* at 12–13.
[22] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404 (AM. L. INST. 2018)
[23] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013) (discussing how this presumption serves to prevent against clashes between U.S. and other sovereign laws, absent an affirmative intention from the political branch of Congress); MULLIGAN, *supra* note 17, at 13.
[24] *Kiobel*, 569 U.S. at 124.
[25] *Id.* at 124–25.
[26] Franklin A. Gevurtz, *Extraterritorial Application of Statutes and Regulations*, 70 AM. J. COMP. L. i347, i367 (2022).
[27] Mariam Matta, *The Alien Tort Statute: Holding U.S. Corporations Accountable*, 47 RUTGERS L. REC. 199, 212–13 (2019).

cases in the next ten years would provide the Court with the opportunity to circle back to this first question, however.

3. Jesner v. Arab Bank, PLC: No Foreign Corporate Defendants

For all of the ambiguity the Court included at the end of its opinion in *Kiobel*, there can certainly be no doubt about its holding in *Jesner*. In an incredibly fractured opinion, the majority chose to forgo any analysis under *Sosa*'s "specific, universal, and obligatory" test or *Kiobel*'s "touch and concern" test. Instead, it decided to partially answer the question it had ignored the last time it was confronted with the ATS: whether liability could extend to corporations. As a result of the opinion in *Jesner*, it was unequivocal that "foreign corporations may not be defendants in suits brought under the [ATS]."[28]

While a majority agreed to this blanket rule, the justices could not agree on the specific rationale for the rule. One group, led by Justice Kennedy, alluded to the political question doctrine, just as it had done previously, arguing that this was a matter for Congress to decide, rather than an Article III court.[29] In a concurring opinion, Justice Alito argued that the test for ATS applicability should instead hinge on whether recognizing claims would "materially advance the ATS's objective of avoiding diplomatic strife."[30] Justice Gorsuch penned a separate concurring opinion to note that not only was this a separation of powers issue, but that the history of the ATS made clear it was only ever intended to apply to U.S. defendants (regardless of whether they were a

[28] *Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).*
[29] *Id.* (plurality opinion) ("With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.").
[30] *Id.* at 1410 (Alito, J., concurring in part and concurring in the judgment).

natural person or a corporation).[31] Justice Thomas said he agreed with Justices Kennedy, Alito, and Gorsuch in their reasoning.[32]

4. Nestlé USA, Inc. v. Doe: No Corporate Defendants Ever

The holdings in *Kiobel* on extraterritoriality and in *Jesner* on party identity came together in the *Nestlé* case. On the extraterritoriality question, the Court applied a two-step framework, first recalling that *Kiobel* held that the ATS does not give any "clear, affirmative indication" that it applies extraterritorially.[33] In the absence of a Congressional grant of extraterritorial application, the Court looked to see if case-specific facts could rebut this presumption because the "conduct relevant to the statute's focus occurred in the United States."[34] It was at this stage that the Court completely eschewed the "touch and concern" standard proffered in *Kiobel*, holding that—regardless of which party was correct on the applicable conduct for the "focus" test—it was impossible for the plaintiffs to overcome the presumption against extraterritoriality because "[n]early all the conduct that they say aided and abetted forced labor ... occurred in Ivory Coast."[35]

The Court could have ended its inquiry there, yet it continued on, turning to evaluate whether the ATS could even be applied to the defendants, given the circumstances. The majority chose to overturn the Ninth Circuit's reasoning for applying the ATS—that "every major operational decision by [defendants] is made in or approved in the [United States]"[36]—because "[n]early all the conduct that [plaintiffs] say aided and abetted forced labor—providing training,

[31] *Id.* at 1412–19 (Gorsuch, J., concurring in part and concurring in the judgment); *see also* MULLIGAN, *supra* note 17, at 17.
[32] *Jesner*, 138 S. Ct. at 1408 (Thomas, J., concurring).
[33] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (citing the "clear, affirmative indication" standard established in RJR Nbisco, Inc. v. European Community, 579 U.S. 325, 337 [2016]).
[34] *Id.* (emphasis added) (quoting *RJR Nabisco*, 579 U.S. at 337).
[35] *Id.* at 1937; *see also* MULLIGAN, *supra* note 17, at 19–20.
[36] *Nestlé*, 141 S. Ct. at 1937 (internal quotations omitted).

fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[37] In essence, general corporate activity is insufficient to establish domestic application of the ATS.[38]

To be clear, it is not a holding in *Nestlé* that domestic corporations cannot ever be defendants. Looking at the concurring opinions, it seems that a majority of the Court actually is prepared to allow application to the ATS to domestic corporations as a general rule, provided that the other established tests are satisfied.[39] However, given the current trends of this Court, domestic corporate accountability under the ATS feels unlikely.

B. *Failed Alternatives*

So where does this leave the state of the ATS? First, there must be an accepted violation of international law defined with "a specificity comparable to the features of the 18th century paradigms we have recognized."[40] As part of this analysis, it is also necessary to evaluate "practical consequences of making that cause available to litigants in federal courts," such as whether there are additional local remedies that could be exhausted first or whether this case would raise foreign relations frictions between the United States and another country.[41] Further, since the ATS does not apply extraterritorially,[42] the conduct underpinning the cause of action "relevant to the [ATS'] focus" must have occurred in the United States.[43] This "focus" test is much more restrictive than

[37] *Id.*
[38] *Id.*
[39] *See* MULLIGAN, *supra* note 19, at 22-23 and n.211 (discussing concurring opinions in *Nestlé USA, Inc.*, 141 S. Ct. at 1940 (Gorsuch, J. with Alito, J., concurring) ("The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding.") and *id.* at 1948 n.4 (Sotomayor, J. with Breyer & Kagan, JJ., concurring in part and concurring in the judgment) (" [T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.")). *See also* MULLIGAN, *supra* note 19, at 22-23 (discussing Justice Alito's dissenting opinion in *Nestlé USA*, 141 S. Ct. at 1950 ("Corporate status does not justify special immunity.")).
[40] *Sosa*, 542 U.S. at 725.
[41] *Id.* at 732–33 and n.21.
[42] *Kiobel*, 569 U.S. at 124.
[43] *Nestlé*, 141 S. Ct. at 1936 (quoting *RJR Nabisco*, 579 U.S. at 337). *See also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 404, cmt. 6 (AM. L. INST. 2018).

Kiobel's initial "touch and concern" test.[44] There is also the blanket prohibition on foreign corporations as defendants.[45] While, on paper, there may technically be a path forward for suits under the ATS, it is hard to see how it could be utilized in any meaningful way. As such, ever since the walls began closing in with the *Sosa* decision, many lawyers and scholars have been exploring alternative options for securing justice.

One common alternative is the Torture Victim Protection Act (TVPA),[46] which explicitly created a private cause of action for individuals who are victims of torture or extrajudicial killings. It was enacted not long after the explosion of human rights violations litigation that came out of *Filártiga*, and, unlike the ATS, was available to both U.S. citizens and non-citizens alike.[47] Though the TVPA covers only a small subset of potential claims under the ATS, it is already a stronger statutory basis for a claim because it goes beyond just establishing jurisdiction. However, the TVPA is still significantly limited in that it is still subject to the presumption against extraterritoriality and can only be invoked against natural persons, not organizations.[48] Further, the TVPA specifies that it only applies to those acts carried out by people acting under the color of law of a foreign nation, meaning it can only be invoked against government officials acting within their official duties.[49]

Another common alternative is the Trafficking Victims Protection Reauthorization Act (TVPRA).[50] In many ways, the TVPRA continued to build on many of the gaps that existed in the

[44] MULLIGAN, *supra* note 17, at 22 and n.209 (citing examples of scholarly commentary arguing this point).
[45] *Jesner*, 138 S. Ct. at 1407.
[46] Torture Victim Protection Act, 28 U.S.C. § 1350 note.
[47] *See, e.g.*, Ewell, Hathaway, and Nohle, *supra* note 7, at 1263 (discussing how one of the motivations behind the passage of the TVPA was that, over the course of litigation, some of the plaintiffs in the *Marcos* proceedings had become U.S. citizens and no longer had standing under the ATS, which was perceived as "unjust").
[48] Mohamad v. Palestinian Authority, 566 US. 449, 451-52 (2012) ("We hold that the term "individual" as used in the Act encompasses only natural persons. Consequently, the Act does not impose liability against organizations.").
[49] Torture Victim Protection Act, 28 U.S.C. § 1350 note 2(a).
[50] Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1595-96.

ATS and TVPA. For one, it explicitly stated that it provided extraterritorial jurisdiction over covered claims.[51] Additionally, the TVPRA seems to be open to corporate liability in ways that the ATS and TVPA are not—especially notably that it extends liability to those who "knew or should have known" about the violations.[52] This expanded standard only works, however, if corporations have a duty to be aware of the conditions in their supply chain to begin with.[53]

While the TVPA and TVPRA are the current common federal alternatives to the ATS, there are several federal statutes designed to protect victims of human rights violations. Unfortunately, they all seem to fall victim to the same or similar pitfalls over and over again. For example, the Anti-Terrorism Act includes liability for organizations,[54] but can only be seized by U.S. nationals.[55] The federal Racketeer Influenced and Corrupt Organizations (RICO) Act[56] can be invoked as a way of getting at corporations, since the RICO Act's definition of "racketeering" is incredibly broad;[57] however, jurisdiction for civil remedies is limited to "any appropriate United States district court," so any application of the RICO Act still would be subject to the presumption against extraterritoriality.[58]

Absent any changes from Congress to the ATS or any companion acts—and, to be sure, changes are being discussed in Congress[59]—it seems as if plaintiffs will have to navigate a

[51] *Id.* § 1596(a).
[52] Ewell, Hathaway, and Nohle, *supra* note 7, at 1280 (noting how § 1595[a] refers to "perpetrators" broadly, rather than specifying "individual" like the ATS and TVPA); *see also* Jennifer Green, *Closing the Accountability Gap in Corporate Supply Chains for Violations of the Trafficking Victims Protection Act*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL 449, 450 (2021).
[53] Green, *supra* note 52, at 450–51.
[54] Anti-Terrorism Act, 18 U.S.C. § 2333(d)(2).
[55] *Id.* § 2333(a).
[56] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68.
[57] Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, INTERNATIONAL LAW, 50–51 (2005).
[58] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, 1964(c).
[59] Back in May 2022, Sens. Richard Durbin (D-IL) and Sherrod Brown (D-OH) introduced the Alien Tort Statute Clarification Act (ATSCA) to attempt to rectify some of the present shortcomings of the ATS. Alien Tort Statute Clarification Act, S.4155, 117th Cong. (2022). In particular, ATSCA proposes to explicitly amend the ATS to include a new provision granting extraterritorial jurisdiction over the covered torts if the defendant is a U.S. national, a lawful

quagmire of jurisdiction, party status, extraterritoriality, and more, just to determine whether or not they have the right to file a claim. Whether or not that lawsuit will survive long enough to see a judgment on the merits is a whole separate issue. If federal statutes will not best and most effectively serve victims of human rights violations, then it is necessary to explore alternative options.

III. Recognition and Enforcement of Foreign Judgments as a Workaround on Extraterritoriality

At the end of the day, the biggest obstacle that plaintiffs will face in pursuing claims for human rights violations is needing to overcome the presumption against extraterritoriality. It will not matter who has the a right to a cause of action, or whether a corporation can be a defendant or not, if any claim is limited to violations that take place within the United States. Certainly, there are plenty of potential human rights violations within the federal domestic jurisdiction that can and should be addressed.[60] That being said, the current framework is a far cry from authentically embracing the original intent of the ATS and why the First Congress created a remedy for international law violations.[61] As federal jurisdiction over international human rights violations seems to be suffering a slow death by one thousand papercuts, state law provides a unique opportunity to reinvigorate this fight. But first there must be a judgment to recognize and enforce.

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permanent resident, or otherwise present in the United States. *Id.* § 3. For discussion on why ATSCA is necessary, *see, e.g.*, William S. Dodge Hathaway Oona A., *Answering the Supreme Court's Call for Guidance on the Alien Tort Statute*, JUST SECURITY (2022), https://www.justsecurity.org/81730/answering-the-supreme-courts-call-for-guidance-on-the-alien-tort-statute/ (last visited Mar. 11, 2023); Christopher Ewell Nohle Oona A. Hathaway, Ellen, *Why We Need the Alien Tort Statute Clarification Act Now*, JUST SECURITY (2022), https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now/ (last visited Mar. 11, 2023).

[60] While conducting an empirical analysis of all published ATS opinions, researchers found there was only one ATS lawsuit concerning the use of torture as a U.S.-sanctioned interrogation method that resulted in a monetary judgment for the plaintiffs. Ewell, Hathaway, and Nohle, *supra* note 7, at 1264–65 (discussing Salim v. Mitchell, 268 F.Supp.3d 1132 [E.D. Wash. 2017]).

[61] MULLIGAN, *supra* note 17, at 3 (noting how the intended purpose of the ATS was to "promote harmony in international relations" through the creation of a remedy for violations where the absence of a remedy might provoke adverse consequences to the United States [quoting *Jesner*, 138 S. Ct. at 1390]).

A. *Filing Suit in Friendlier Jurisdictions*

While the United States continues to restrict opportunities to hold perpetrators accountable for their role in human rights violations, other countries are expanding them.[62] This section will briefly review three claimant-friendly judgments from a mix of common law and civil law jurisdictions, and the laws and doctrines each jurisdiction used to reach the conclusions it did. The purpose of this truncated case study is to briefly survey how a claimant might best be able to seize a foreign jurisdiction to govern their human rights violations claim. Following these reviews, this section will discuss how to have these types of foreign judgments recognized and enforced in the United States.

1. The Netherlands

Akpan en Milieudefensie/Royal Dutch Shell en SPDC emerged out of a series of progressively worsening oil spills near a village in Nigeria.[63] Here, the defendants were SPDC, a Nigerian entity involved in oil extraction in the country, and is parent company Royal Dutch Shell (established in the United Kingdom, but with offices in the Netherlands).[64] The first small spill happened in August 2006, with a major spill happening almost a year later in late July or early August 2007.[65] It was not until November 2007 SPDC finally stopped the ongoing oil spill by closing the valves.[66] It took another year for remediation to begin, and that effort was not finished until March 2009—two and a half years after the first spill began.[67] A 2012 investigative report

[62] *See generally* Ewell, Hathaway, and Nohle, *supra* note 7, at 1282–83; Luke D. Anderson, *An Exception to Jesner: Preventing U.S. Corporations and Their Subsidiaries from Avoiding Liability for Harms Caused Abroad Comments*, 34 EMORY INT'L L. REV. 997, 1006 (2019).
[63] Rechtbank Den Haag 30 januari 2013, NJF 2013, 99 m.nt. (Akpan en Milieudefensie/Royal Dutch Shell en SPDC) (Neth.).
[64] *Id.* 2.2.
[65] *Id.* 2.6.
[66] *Id.* 2.7.
[67] *Id.* 2.8.

created for litigation noted that the wellhead had not been properly isolated and secured, and "had Shell properly secured the wellhead, oil release would not have been possible."[68]

The defendants tried to argue that differing legal bases for the claims against them precluded the Court from properly exercising jurisdiction (because SPDC could not "foresee" that it could be hauled into court in the Netherlands);[69] however, the claimants were using the tort of negligence under Nigerian law for claims against both defendants, so there was no substantive difference in the applicable law, regardless of which forum in which law that was applied.[70] Additionally, the Court acknowledged an ongoing international trend to hold parent companies of multinationals liable in their own country for damage-causing actions by foreign subsidiaries when that subsidiary is also summoned.[71] Even if the claims against Royal Dutch Shell in the Hague were separated from the claims against SPDC, such that there was a question about whether the SPDC should be assessed independently in Nigerian court, the "so-called *forum non conveniens* restriction no longer plays a role in current international private law."[72] No matter the arguments the defendants tried to use, it seemed that their claims would continue to be bound together in the same lawsuit. Because of this, the Court had no issues applying Nigerian substantive law in a Dutch courtroom.[73]

Part of what enabled the Dutch court to find jurisdiction over both defendants here was the "plurality of defendants" doctrine.[74] This doctrine operates in a similar manner to how pendent party jurisdiction used to operate in U.S. federal courts, allowing for jurisdiction over an otherwise unreachable party because that party is so connected to a defendant the court does have jurisdiction

[68] *Id.* 2.13.
[69] *Id.* 4.4-5.
[70] *Id.* 4.5.
[71] *Id.*
[72] *Id.* 4.6
[73] *Id.* 4.8-10.
[74] Anderson, *supra* note 62, at 1017.

over that reasons of efficiency justify a joint hearing.[75] What makes the Dutch application of this doctrine different is that it is not a creature of common law, but rather directly codified into the Dutch Code of Civil Procedure.[76] Moving forward from *Akpan*, it is easy to see how this doctrine can be further developed to bring in to court those parties that are otherwise difficult to assert personal jurisdiction over.

2. The United Kingdom

Vedanta Resources v. Lungowe centered on allegations of environmental pollution and toxic emissions from the Nchanga Copper Mine in Zambia.[77] In their initial complaint, claimants were the roughly 1,800 Zambian villagers who lived in the area surrounding the mine and claimed that repeated toxic discharges from the mine into the local waterways had damaged both their health and their farming activities.[78] Principally, they relied on the common law torts of negligence and breach of statutory duty.[79] The mine is owned by KCM, a Zambian company that is owned by Vedanta, a company incorporated and domiciled in the United Kingdom.[80]

This procedural appeal is not about the merits of the claims, but rather whether English courts were competent to adjudicate the matter. The two most relevant issues on appeal were:

> (1) whether it is an abuse of EU law to rely on article 4 of the Recast Brussels Regulation for jurisdiction over Vedanta as anchor defendant so as to make KCM a "necessary or proper party"; [. . .] and (4) even if Zambia would otherwise be the proper place, whether there was a real risk that the claimants would not obtain access to substantial justice in the Zambian jurisdiction.[81]

[75] *Id.*
[76] Artikel 7, lid 1, Rv. (Neth.).
[77] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20, [1] (appeal taken from EWCA (Civ)).
[78] *Id.*
[79] *Id.* at [3].
[80] *Id.* at [2].
[81] Press Release, Supreme Court of the United Kingdom, Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20 (Apr. 10, 2019), https://www.supremecourt.uk/cases/docs/uksc-2017-0185-press-summary.pdf.

On the first issue, Article 4.1 of the Recast Brussels Regulation is significant because it gives any claimant (regardless of their domicile) the right to sue an English-domiciled defendant in England, regardless of any ties the claim has to other jurisdictions.[82] In essence, for English defendants, there cannot be a *forum non conveniens* argument. The Court noted that any implied exception to this rule must be construed narrowly, and that EU case law suggests that this is an inappropriate use of the abuse of law doctrine.[83] Ultimately, the defendants failed on this issue based on prior English precedent that *forum conveniens* arguments do not eclipse the jurisdiction rule established in Article 4.1.[84]

On the fourth issue, the Court was asked to address an interesting question related to the choice of venue. Under England's "proper place" test, the standard is whether there is a single jurisdiction where all of the claims against all of the defendants may most suitably be tried.[85] However, even if the apparently proper venue is in a foreign jurisdiction, the claims against the non-English defendant can still proceed in England if the evidence shows that the foreign jurisdiction would not be able to provide "substantial justice."[86] The Court pointed to the practicable impossibility of litigation funding and a lack of sufficiently substantial and suitably experienced legal teams to enable effective litigation against a well-resourced client like KCM as significant issues that would allow the complainants to keep the claims against both defendants in England.[87] After full consideration, the Court dismissed the entire appeal primarily on the "substantial justice" issue.[88]

[82] *Vedanta* at [16].
[83] *Id.* at [29]–[34], [36].
[84] *Id.* at [36]–[41].
[85] *Id.* at [66], [68].
[86] *Id.* at [88].
[87] *Id.* at [89]–[90], [101].
[88] *Id.* at [102].

Part of what makes *Vedanta* such a significant ruling is the Court's concerns about "substantial justice." Claims for human rights violations can be incredibly time-consuming and far more expensive than victims can afford.[89] Here, the Court suggests that not only are "substantial justice" concerns a highly relevant factor to consider in forum analysis, but it also opens the door for this factor to outweigh potential competing issues of comity.[90] There is also discussion about this decision continuing to push the bounds of parent company duty of care to reach and maybe even go beyond the overall corporate group.[91] Part of what allowed the plaintiffs in *Vedanta* to assert jurisdiction over KCM was that KCM's parent company was an English domicile.[92] Following this logically, the further up the corporate ladder one can go, the easier it will become to haul overseas defendants to friendlier jurisdictions.

3. Canada

Nevsun Resources Ltd. v. Araya concerned allegations of forced labor, slavery, crimes against humanity, and other rights violations at an Eritrean mine operated by the subsidiary of a Canadian company.[93] As part of a mandatory national military conscription, claimants arrived at the Bisha Mine in 2008.[94] Over the next three years, claimants were unable to leave the mine, and were forced to work twelve hours per day, six days per week in dangerously high heat.[95] In filing their suit, the claimants argued that Nevsun (the Canadian parent company) was responsible for

[89] Tara Van Ho, *Vedanta Resources PLC and Another v. Lungowe and Others International Decisions*, 114 AM. J. INT'L L. 110, 114 (2020).
[90] *Id.*
[91] Carrie Bradshaw, *Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court*, 32 JOURNAL OF ENVIRONMENTAL LAW 139, 147 (2020) (internal footnotes removed).
[92] *Vedanta* at [2].
[93] Nevsun Resources Ltd. v. Araya, [2020] 1 SCR 166, paras. 3, 7 (Can. B.C., B.C.C.A.)
[94] *Id.* at para. 9.
[95] *Id.* at paras. 9-15.

violating customary international law.[96] In particular, plaintiffs were claiming violations of preemptory norms.[97]

Nevsun argued that the "act of state doctrine" prohibited Canadian courts from passing judgment on actions taken by the Eritrean government (since the initial conscription requirement is from the government).[98] Never before had this doctrine been applied in Canada.[99] Further, Nevsun argued that they could not be sued for violating customary international law.[100] Between these two issues, they argued that the Canadian court lacked the jurisdiction and power to rule on this lawsuit. Both the trial court and appellate court ruled that the lawsuit could move forward, so Nevsun appealed to the Supreme Court of Canada.[101]

In its judgment, the Court first held that the "act of state doctrine" was not a part of Canadian law, reasoning that, in contrast to England, Canadian law approaches to conflict of laws and judicial restraint developed as separate doctrines.[102] However, customary international law is a part of Canadian law, and, unlike treaty law which requires an act of Parliament to enforce it, customary international law is automatically a part of the national law.[103] Since customary international law is part of Canadian law, that meant that courts had the requisite competency to find Canadian companies responsible for violating it.[104] The case was then remanded back to the trial court to determine the suit on the merits question.[105]

[96] *Id.* at para. 4.
[97] *Id.* at para. 99.
[98] *Id.* at para. 27.
[99] *Id.* at paras. 28, 56.
[100] *Id.* at paras. 16, 63.
[101] *Id.* at paras. 19-20, 23-25.
[102] *Id.* at para. 44.
[103] *Id.* at paras. 85-95.
[104] *Id.* at para. 132.
[105] *Id.* at para. 133.

There are two crucial aspects of the *Nevsun* opinion that shed light on how Canada can be a great forum moving forward for human rights violations. Firstly, there is the understanding that customary international law is automatically absorbed into Canada's common law, in essence that customary international law is always self-executing.[106] This saves the legislature from constantly needing to play catchup and ensures that "where there is a right, there must be a remedy for its violation."[107] Secondly, *Nevsun* explicitly rebuts the notion that corporations cannot be held liable under international law.[108] Rather, the Court acknowledges that, although international law traditionally only regulated states, it has evolved significantly to at least partially extend to natural persons and nonstate entities.[109]

B. *Recognition and Enforcement*

The above-referenced cases are illustrative of a bigger shift in how nations view their responsibilities to provide remedies for human rights violations. Other nations, especially those in the European Union, are opening up their courtrooms to non-nationals for extraterritorial claims.[110] In fact, Canada has gone so far as to acknowledge that, to the extent it even becomes applicable, the act of state doctrine is not ironclad, but rather a rebuttable presumption.[111] All three cases

[106] *Id.* at paras. 86, 90. *See also* Beatrice A. Walton, *Nevsun Resources Ltd. v. Araya*, 115 AM. J. INT'L L. 107, 109-110 (2021).
[107] *Nevsun* at para. 120 (internal quotations omitted).
[108] Beatrice A. Walton, *Nevsun Resources Ltd. v. Araya*, 115 AM. J. INT'L L. 107, 110 (2021); *contra Jesner*, 138 S. Ct. at 1402 ("[T]he Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations.").
[109] Walton, *supra* note 110, at 110; *Nevsun* at para. 113.
[110] Anderson, *supra* note 62, at 1012 ("Since at least 2012, some scholars suggest that the European Union is growing more tolerant of claims based on foreign acts, while the United States is growing less tolerant of extraterritorial adjudication.") (citations omitted).
[111] Jason Haynes, *The Confluence of National and International Law in Response to Multinational Corporations' Commission of Modern Slavery: Nevsun Resources Ltd. V. Araya*, 8 JOURNAL OF HUMAN TRAFFICKING 441, 444 (2022) ("The majority, however, rightly acknowledged that since *Oppenheimer v Cattermole* [1976 AC 249], some inroads into the act of state doctrine have been created, such that a national court may abridge the act of state doctrine where a foreign state's actions are fundamentally unacceptable for reasons of breach human rights violations, or public policy, more generally [*Kuwait Airways Corporation v Iraqi Airways Co. (Nos. 4 and 5) [2002] UKHL 19*].").